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LETTER DATED 2 MARCH 1998 FROM THE PERMANENT REPRESENTATIVE OF THE LIBYAN ARAB JAMAHIRIYA TO THE UNITED NATIONS ADDRESSED TO THE PRESIDENT OF THE SECURITY COUNCIL

Further to my letter No. 405 of 2 March 1998, informing the Security Council of the two Judgments delivered by the International Court of Justice on the interpretation and application of the 1971 Montreal Convention on the Suppression of Unlawful Acts against the Safety of Civil Aviation in connection with the Lockerbie incident of 1988 (Libyan Arab Jamahiriya v. United Kingdom of Great Britain and Northern Ireland and Libyan Arab Jamahiriya v. United States of America) (General List Nos. 88 and 89, respectively), I have the honour to enclose herewith the texts of the above-mentioned two Judgments of the International Court of Justice.

I should be grateful if you would have this letter and its annex circulated as a document of the Security Council.

(Signed) Abuzed Omar DORDA
Ambassador
Permanent Representative

Annex*

[Original: English/French]

CASE CONCERNING QUESTIONS OF INTERPRETATION AND APPLICATION OF THE 1971 MONTREAL CONVENTION ARISING FROM THE AERIAL INCIDENT AT LOCKERBIE

(LIBYAN ARAB JAMAHIRIYA *v.* UNITED KINGDOM)

PRELIMINARY OBJECTIONS

Objection to jurisdiction — Montreal Convention of 23 September 1971 — Treaty in force between the Parties — Article 14, paragraph 1, of the Convention.

Grounds for lack of jurisdiction invoked in the provisional measures phase — Arguments not reiterated in the present phase of the proceedings — Necessity for the Court nonetheless to deal with those arguments — Negotiations — Request for arbitration — Six-month period before the Court can be seised.

Contention that no legal dispute exists concerning the interpretation and application of the Montreal Convention — Dispute of a general nature as to the legal régime applicable to the destruction of the Pan Am aircraft over Lockerbie — Specific disputes concerning the interpretation and application of Article 7 of the Convention, read in conjunction with Articles 1, 5, 6 and 8, and the interpretation and application of Article 11 of the Convention.

Contention that it is not for the Court to decide on the lawfulness of actions instituted by the Respondent to secure the surrender of the two alleged offenders — Jurisdiction of the Court to decide on the lawfulness of those actions in so far as they would be at variance with the provisions of the Montreal Convention.

Security Council resolutions 748 (1992) and 883 (1993) — Adoption after filing of the Application — Jurisdiction to be determined at the date of filing of the Application.

Objection to admissibility — Contention that Security Council resolutions 748 (1992) and 883 (1993) created legal obligations for the Parties which are determinative of any dispute submitted to the Court — Admissibility to be determined at the date of filing of the Application — Adoption of the resolutions after the filing of the Application.

Contention that those resolutions rendered the Applicant's claims without object — Objection to the Court proceeding to judgment on the merits — Article 79, paragraph 1, of the Rules of Court — "Preliminary" Objection — Formal conditions for presentation — Article 79, paragraph 7, of the Rules of Court — 1972 Revision — Objection which is "not exclusively" preliminary containing "both preliminary aspects and other aspects relating to the merits" — Rights on the merits constituting the very subject-matter of a decision on the objection.

Fixing of time-limits for the further proceedings.

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* The present annex is being issued as received in the languages of submission.

JUDGMENT

Present: Vice-President WEERAMANTRY, Acting President; President SCHWEBEL; Judges ODA, BEDJAOUI, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, PARRA-ARANGUREN, KOOIJMANS, REZEK;

Judges ad hoc Sir Robert JENNINGS, EL-KOSHERI; Registrar VALENCIA-OSPINA.

In the case concerning questions of interpretation and application of the 1971 Montreal Convention arising from the aerial incident at Lockerbie,

between

the Great Socialist People's Libyan Arab Jamahiriya,

represented by

H.E. Mr. Hamed Ahmed Elhouderi, Ambassador, Secretary of the People's Office of the Great Socialist People's Libyan Arab Jamahiriya to the Netherlands,

as Agent;

Mr. Mohamed A. Aljady,
Mr. Abdulhamid Raeid,

as Counsel;

Mr. Abdelrazeg El-Murtadi Suleiman, Professor of Public International Law, Faculty of Law, University of Benghazi,
Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., Chichele Professor of Public International Law, University of Oxford,
Mr. Jean Salmon, Professor of Law emeritus, Université libre de Bruxelles,
Mr. Eric Suy, Professor of International Law, Catholic University of Louvain (K.U. Leuven),
Mr. Eric David, Professor of Law, Université libre de Bruxelles,

as Counsel and Advocates;

Mr. Nicolas Angelet, Principal Assistant, Faculty of Law, Catholic University of Louvain (K.U. Leuven),
Mrs. Barbara Delcourt, Assistant, Faculty of Social, Political and Economic Sciences, Université libre de Bruxelles; Research Fellow, Centre of International Law and Institute of European Studies, Université libre de Bruxelles,
Mr. Mohamed Awad,

as Advisers.

and

the United Kingdom of Great Britain and Northern Ireland,

/...

represented by

Sir Franklin Berman, K.C.M.G., Q.C., Legal Adviser to the Foreign and Commonwealth Office,

as Agent and Counsel;

The Right Honourable the Lord Hardie, Q.C., The Lord Advocate for Scotland,
Mr. Christopher Greenwood, Barrister, Professor of International Law at the London School of Economics,
Mr. Daniel Bethlehem, Barrister, London School of Economics,

as Counsel;

Mr. Anthony Aust, C.M.G.,

as Deputy Agent;

Mr. Patrick Layden, T.D.,
Mr. Norman McFadyen,
Ms Sarah Moore,
Ms Susan Hulton,

as Advisers;

Ms Margaret McKie,

as secretary,

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 3 March 1992, the Government of the Great Socialist People's Libyan Arab Jamahiriya (hereinafter called "Libya") filed in the Registry of the Court an Application instituting proceedings against the Government of the United Kingdom of Great Britain and Northern Ireland (hereinafter called "the United Kingdom") in respect of a "dispute between Libya and the United Kingdom concerning the interpretation or application of the Montreal Convention" of 23 September 1971 for the Suppression of Unlawful Acts against the Safety of Civil Aviation (hereinafter called "the Montreal Convention"). The Application referred to the destruction, on 21 December 1988, over Lockerbie (Scotland), of the aircraft on Pan Am flight 103, and to charges brought by the Lord Advocate for Scotland in November 1991 against two Libyan nationals suspected of having caused a bomb to be placed aboard the aircraft, which bomb had exploded causing the aeroplane to crash. The Application invoked as the basis for jurisdiction Article 14, paragraph 1, of the Montreal Convention.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was immediately communicated to the Government of the United Kingdom by the Registrar; pursuant to paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. Pursuant to Article 69, paragraph 3, of the Rules of Court, the Registrar addressed to the Secretary General of the International Civil Aviation Organization the notification provided for in Article 34, paragraph 3, of the Statute.

Pursuant to Article 43 of the Rules of Court, the Registrar also addressed the notification provided for in Article 63, paragraph 1, of the Statute to all those States which, on the basis of information obtained from the depositary Governments, appeared to be parties to the Montreal Convention.

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4. Since the Court included upon the Bench no judge of Libyan nationality, Libya exercised its right under Article 31, paragraph 2, of the Statute to choose a judge *ad hoc* to sit in the case: it chose Mr. Ahmed Sadek El-Kosheri to do so.

5. On 3 March 1992, immediately after the filing of its Application, Libya submitted a request for the indication of provisional measures under Article 41 of the Statute.

By an Order dated 14 April 1992, the Court, after hearing the Parties, found that the circumstances of the case were not such as to require the exercise of its power to indicate provisional measures.

6. By an Order of 19 June 1992, having regard to the requests of the Parties, the Court fixed 20 December 1993 as the time-limit for the filing by Libya of a Memorial and 20 June 1995 as the time-limit for the filing by the United Kingdom of a Counter-Memorial.

Libya duly filed its Memorial within the prescribed time-limit.

7. Within the time-limit fixed for the filing of its Counter-Memorial, the United Kingdom filed Preliminary Objections to the jurisdiction of the Court and the admissibility of the Application.

Accordingly, by an Order of 22 September 1995, the Court, noting that by virtue of Article 79, paragraph 3, of the Rules of Court the proceedings on the merits were suspended, fixed 22 December 1995 as the time-limit within which Libya might present a written statement of its observations and submissions on the Preliminary Objections.

Libya filed such a statement within the time-limit so fixed, and the case became ready for hearing in respect of the Preliminary Objections.

8. By a letter dated 19 February 1996, the Registrar, pursuant to Article 34, paragraph 3, of the Statute, communicated copies of the written pleadings to the Secretary General of the International Civil Aviation Organization and, referring to Article 69, paragraph 2, of the Rules of Court, specified that, if the Organization wished to present written observations to the Court, they should be limited, at that stage, to questions of jurisdiction and admissibility.

By a letter of 26 June 1996, the Secretary General of the International Civil Aviation Organization informed the Court that the Organization "ha[d] no observations to make for the moment" but wished to remain informed about the progress of the case, in order to be able to determine whether it would be appropriate to submit observations later.

9. By a letter dated 23 November 1995, the Registrar informed the Parties that the Member of the Court having United Kingdom nationality had asked to be excused from taking part in the decision of the case, pursuant to Article 24, paragraph 1, of the Statute. By a letter of 5 March 1997, the Deputy Agent of the United Kingdom, referring to Articles 31 of the Statute and 37 of the Rules of Court, informed the Court of his Government's intention to choose Sir Robert Jennings to sit as judge *ad hoc* in the case. In accordance with Article 35, paragraph 3, of the Rules of Court a copy of that letter was communicated by the Registrar to the Libyan Government, which was informed that 7 April 1997 had been fixed as the time-limit within which Libya could make any observations it might wish to make. No observations from the Libyan Government reached the Court within the time-limit thus fixed.

Having regard to the proceedings instituted by Libya against the United States of America on 3 March 1992 in the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America)*, and to its composition in the present case in which a judge having United States nationality was sitting, in accordance with Article 31, paragraph 1, of the Statute, the Court instructed the Registrar to inform Libya and the United Kingdom, and the United States of America, that it was prepared to accept from them, no later than 30 June 1997, any observations they wished to make in respect of the application of Article 31, paragraph 5, of the Statute. The

Registrar wrote to the three States on 30 May 1997 to that effect. Each of the three Governments submitted observations within the prescribed time-limit. After due deliberation, the Court, by ten votes to three, decided that in the present phase relating to jurisdiction and admissibility in the two cases, the United Kingdom and the United States of America were not parties in the same interest within the meaning of Article 31, paragraph 5, of the Statute; that the choice of a judge *ad hoc* by the United Kingdom was therefore justified in the current phase of the proceedings in the present case; and that accordingly Sir Robert Jennings would sit on the Bench for the purpose of the oral proceedings and would take part in the deliberations by the Court in that phase of the case. The Registrar notified that decision to Libya and to the United Kingdom, and informed the United States of America of the decision, by letters dated 16 September 1997.

10. The President of the Court, being a national of one of the Parties to the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*

(Libyan Arab Jamahiriya v. *United States of America)*, was unable, by virtue of Article 32 paragraph 1, of the Rules of Court, to exercise the functions of the presidency in respect of that case. Although that provision is not applicable in the present case, the President thought it appropriate that he should not exercise the functions of the presidency in the present case as well. It therefore fell to the Vice-President, in accordance with Article 13, paragraph 1, of the Rules of Court, to exercise the functions of the presidency in the case.

11. In accordance with Article 53, paragraph 2, of its Rules, the Court decided to make accessible to the public, on the opening of the oral proceedings, the Preliminary Objections of the United Kingdom and the written statement containing the observations and submissions of Libya on the Objections, as well as the documents annexed to those pleadings, with the exception of Annex 16 to the Preliminary Objections.

12. Public sittings were held between 13 and 22 October 1997, at which the Court heard the oral arguments and replies of:

For the United Kingdom:	Sir Franklin Berman, The Right Honourable the Lord Hardie, Mr. Daniel Bethlehem, Mr. Christopher Greenwood.
For Libya:	H.E. Mr. Hamed Ahmed Elhouderi, Mr. Abdelrazeg El-Murtadi Suleiman, Mr. Jean Salmon, Mr. Eric David, Mr. Eric Suy, Mr. Ian Brownlie.

At the hearings, Members of the Court put questions to the Parties, who answered in writing after the close of the oral proceedings.

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13. In the Application, the following requests were made by Libya:

> "Accordingly, while reserving the right to supplement and amend this submission as appropriate in the course of further proceedings, Libya requests the Court to adjudge and declare as follows:
>
> *(a)* that Libya has fully complied with all of its obligations under the Montreal Convention;
>
> *(b)* that the United Kingdom has breached, and is continuing to breach, its legal obligations to Libya under Articles 5 (2), 5 (3), 7, 8 (2) and 11 of the Montreal Convention; and
>
> *(c)* that the United Kingdom is under a legal obligation immediately to cease and desist from such breaches and from the use of any and all force or threats against Libya, including the threat of force against Libya, and from all violations of the sovereignty, territorial integrity, and the political independence of Libya."

14. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Libya,

in the Memorial:

> "For these reasons, while reserving the right to supplement and amend these submissions as appropriate in the course of further proceedings, Libya requests the Court to adjudge and declare as follows:

(a) that the Montreal Convention is applicable to this dispute;

(b) that Libya has fully complied with all of its obligations under the Montreal Convention and is justified in exercising the criminal jurisdiction provided for by that Convention,

(c) that the United Kingdom has breached, and is continuing to breach, its legal obligations to Libya under Article 5, paragraphs 2 and 3, Article 7, Article 8, paragraph 3, and Article 11 of the Montreal Convention;

(d) that the United Kingdom is under a legal obligation to respect Libya's right not to have the Convention set aside by means which would in any case be at variance with the principles of the United Nations Charter and with the mandatory rules of general international law prohibiting the use of force and the violation of the sovereignty, territorial integrity, sovereign equality and political independence of States."

On behalf of the Government of the United Kingdom,

in the Preliminary Objections:

"For the reasons advanced, the United Kingdom requests the Court to adjudge and declare that:

it lacks jurisdiction over the claims brought against the United Kingdom by the Libyan Arab Jamahiriya

and/or

the claims brought against the United Kingdom by the Libyan Arab Jamahiriya are inadmissible."

On behalf of the Government of Libya,

in the written statement of its observations and submissions on the Preliminary Objections:

"For these reasons, and reserving the right to complement or modify the present submissions in the course of the proceedings if necessary, Libya requests the Court to adjudge and declare:

— that the preliminary objections raised by the United Kingdom must be rejected and that, as a consequence:

(a) the Court has jurisdiction to entertain the Application of Libya,

(b) that the Application is admissible;

— that the Court should proceed to the merits."

15. In the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of the United Kingdom,

at the hearing of 20 October 1997:

"[T]he Court [is requested to] adjudge and declare that:

it lacks jurisdiction over the claims brought against the United Kingdom by the Libyan Arab Jamahiriya

and/or

those claims are inadmissible;

> and that the Court dismiss the Libyan Application accordingly."

On behalf of the Government of Libya:

at the hearing of 22 October 1997:

> "The Libyan Arab Jamahiriya requests the Court to adjudge and declare:
>
> — that the Preliminary Objections raised by the United Kingdom . . . must be rejected and that, as a consequence:
>
> *(a)* the Court has jurisdiction to entertain the Application of Libya,
>
> *(b)* that the Application is admissible;
>
> — that the Court should proceed to the merits."

*
* *

16. In the present case, the United Kingdom has raised two objections: one to the jurisdiction of the Court and the other to the admissibility of the Application. According to the United Kingdom, "both of these are objections of an essentially preliminary character".

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* *

17. The Court will first consider the objection raised by the United Kingdom to its jurisdiction.

18. Libya submits that the Court has jurisdiction on the basis of Article 14, paragraph 1, of the Montreal Convention, which provides that :

> "Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."

19. The Parties agree that the Montreal Convention is in force between them and that it was already in force both at the time of the destruction of the Pan Am aircraft over Lockerbie, on 21 December 1988, and at the time of filing of the Application, on 3 March 1992. However, the Respondent contests the jurisdiction of the Court because, in its submission, all the requisites laid down in Article 14, paragraph 1, of the Montreal Convention have not been complied with in the present case.

* *

20. The Respondent expressly stated that it did not wish to contest the jurisdiction of the Court on all of the same grounds it had relied upon in the provisional measures phase of the proceedings, and restricted itself to alleging that Libya had failed to show, first, that there existed a legal dispute between the Parties and second, that such dispute, if any, concerned the interpretation or application of the Montreal Convention and fell, as a result, within the terms of Article 14, paragraph 1, of that Convention. Consequently, the United Kingdom did not, in the present phase of the proceedings, reiterate its earlier arguments as to whether or not the dispute that, in the opinion of Libya, existed between the Parties could be settled by negotiation; whether Libya had made a proper request for arbitration; and whether the six-month period required by Article 14, paragraph 1, of the Convention had been complied with.

21. The Court nonetheless considers it necessary to deal briefly with these arguments. It observes that in the present case the Respondent has always maintained that the destruction of the Pan Am aircraft over Lockerbie did not give rise to any dispute between the Parties regarding the interpretation or application of the Montreal Convention, and that, for that reason, in the Respondent's view, there was nothing to be settled by negotiation under the Convention; the Court notes that the arbitration proposal contained in the letter sent on 18 January 1992 by the Libyan Secretary of the People's Committee for Foreign Liaison and International Cooperation to the Minister for Foreign Affairs of the United Kingdom met with no answer; and it notes, in particular, that the Respondent clearly expressed its intention not to accept arbitration — in whatever form — when presenting and strongly supporting resolution 731 (1992) adopted by the Security Council three days later, on 21 January 1992.

Consequently, in the opinion of the Court the alleged dispute between the Parties could not be settled by negotiation or submitted to arbitration under the Montreal Convention, and the refusal of the Respondent to enter into arbitration to resolve that dispute absolved Libya from any obligation under Article 14, paragraph 1, of the Convention to observe a six-month period starting from the request for arbitration, before seising the Court.

* *

22. As recalled by the Parties, the Permanent Court of International Justice stated in 1924 that "[a] dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*Mavrommatis Palestine Concessions, 1924, P.C.I.J., Series A, No. 2*, p. 11). The present Court for its part, in its Judgment of 30 June 1995 in the case concerning *East Timor (Portugal* v. *Australia)*, emphasized the following:

> "In order to establish the existence of a dispute, 'it must be shown that the claim of one party is positively opposed by the other' (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328; and further, 'Whether there exists an international dispute is a matter for objective determination' (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion, I.C.J. Reports 1950*, p. 74)." (*I.C.J. Reports 1995*, p. 100.)

*

23. In its Application and Memorial, Libya maintained that the Montreal Convention was the only instrument applicable to the destruction of the Pan Am aircraft over Lockerbie, for the following reasons:

(a) the Respondent and Libya are bound by the Montreal Convention which is in force between the Parties;

(b) the Montreal Convention is specifically aimed at preventing that type of action (third paragraph of the Preamble);

(c) the actions ascribed to the Libyan nationals are covered by Article 1 of the Montreal Convention;

(d) "the system of the Montreal Convention, as compared to the system of the Charter, is both a *lex posterior* and a *lex specialis*; consequently, for matters covered by that Convention, it must *a priori* take precedence over the systems for which the Charter provides"; and

(e) there is no other convention concerning international criminal law in force which is applicable to these issues in the relations between Libya and the United Kingdom.

24. The United Kingdom does not deny that, as such, the facts of the case could fall within the terms of the Montreal Convention. However, it emphasizes that, in the present case, from the time Libya invoked the Montreal Convention, the United Kingdom has claimed that it was not relevant as the question to be resolved had to do with "the . . . reaction of the international community to the situation arising from Libya's failure to respond effectively to the most serious accusations of State involvement in acts of terrorism".

25. Consequently, the Parties differ on the question whether the destruction of the Pan Am aircraft over Lockerbie is governed by the Montreal Convention. A dispute thus exists between the Parties as to the legal régime applicable to this event. Such a dispute, in the view of the Court, concerns the interpretation and application of the Montreal Convention, and, in accordance with Article 14, paragraph 1, of the Convention, falls to be decided by the Court.

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26. Furthermore, in its Application and Memorial, Libya stressed the following six points in particular in support of the submissions set forth, respectively, in paragraph 13 (subparagraphs *(a)* and *(b)*) and paragraph 14 (subparagraphs *(b)* and *(c)*), above:

(a) the actions which brought about the destruction of the Pan Am aircraft over Lockerbie constitute one of the offences covered by Article 1 of the Montreal Convention and therefore the Montreal Convention must be applied to those facts;

(b) Libya has complied with the obligation imposed by Article 5, paragraph 2, of the Montreal Convention of establishing its jurisdiction over the alleged offenders in the destruction of the aircraft, and it has the right to exercise the jurisdiction so established;

/...

(c) Libya has exercised its jurisdiction over the two alleged offenders on the basis of its Penal Code, and the Respondent should not interfere with the exercise of that jurisdiction;

(d) Libya has exercised the rights conferred by Article 6 of the Montreal Convention by taking all necessary measures to ensure the presence of the two alleged offenders, making preliminary enquiries, notifying the States concerned and indicating that it intended to exercise jurisdiction, but the Respondent, by its actions and threats, is attempting, according to Libya, to prevent the application of the Convention;

(e) Libya having decided not to extradite the two alleged offenders, Article 7 of the Montreal Convention gives it the right to submit them to its competent authorities for the purpose of prosecution in accordance with Libyan law; and

(f) on the basis of Article 8, paragraph 3, of the Montreal Convention, it has the right not to extradite the two alleged offenders because they are Libyan nationals and the Libyan Constitution does not permit their extradition.

27. The Respondent disputes that the Montreal Convention confers on Libya the rights it claims to enjoy. It contends, moreover, that none of the provisions referred to by Libya imposes obligations on the United Kingdom. Finally, it recalls that it never itself invoked the Montreal Convention, and observes that nothing in that Convention prevented it from requesting the surrender of the two alleged offenders outside the framework of the Convention.

28. Article 1 of the Montreal Convention provides as follows:

"***Article 1***

1. Any person commits an offence if he unlawfully and intentionally:

(a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or

(b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or

(c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or

(d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or

(e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

2. Any person also commits an offence if he:

(a) attempts to commit any of the offences mentioned in paragraph 1 of this Article; or

(b) is an accomplice of a person who commits or attempts to commit any such offence."

Article 5 provides:

"***Article 5***

1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offences in the following cases:

(a) when the offence is committed in the territory of that State;

(b) when the offence is committed against or on board an aircraft

> registered in that State;
>
> *(c)* when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;
>
> *(d)* when the offence is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.
>
> 2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offences mentioned in Article 1, paragraph 1 *(a)*, *(b)* and *(c)*, and in Article 1, paragraph 2, in so far as that paragraph relates to those offences, in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.
>
> 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law."

Article 6, for its part, states:

> "***Article 6***
>
> 1. Upon being satisfied that the circumstances so warrant, any Contracting State in the territory of which the offender or the alleged offender is present, shall take him into custody or take other measures to ensure his presence. The custody and other measures shall be as provided in the law of that State but may only be continued for such time as is necessary to enable any criminal or extradition proceedings to be instituted.
>
> 2. Such State shall immediately make a preliminary enquiry into the facts.
>
> 3. Any person in custody pursuant to paragraph 1 of this Article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national.
>
> 4. When a State, pursuant to this Article, has taken a person into custody, it shall immediately notify the States mentioned in Article 5, paragraph 1, the State of nationality of the detained person and, if it considers it advisable, any other interested State of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 2 of this Article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction."

Article 7 is worded in the following terms:

> "***Article 7***
>
> The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."

Finally, in the words of Article 8:

> "***Article 8***
>
> 1. The offences shall be deemed to be included as extraditable offences in any extradition treaty existing between Contracting States. Contracting States undertake to include the offences as extraditable offences in every extradition treaty to be concluded between them.

> 2. If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offences. Extradition shall be subject to the other conditions provided by the law of the requested State.
>
> 3. Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.
>
> 4. Each of the offences shall be treated, for the purpose of extradition between Contracting States, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with Article 5, paragraph 1 *(b)*, *(c)* and *(d)*."

29. In view of the positions put forward by the Parties, the Court finds that there exists between them not only a dispute of a general nature, as defined in paragraph 25 above, but also a specific dispute which concerns the interpretation and application of Article 7 — read in conjunction with Article 1, Article 5, Article 6 and Article 8 — of the Montreal Convention and which, in accordance with Article 14, paragraph 1, of the Convention, falls to be decided by the Court.

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30. Furthermore, Libya maintained in its Application and Memorial that, once it had commenced its judicial investigation of the two alleged offenders, the Respondent was, according to Article 11, paragraph 1, of the Montreal Convention, under an obligation to hand over to the Libyan authorities all the evidence in its possession regarding the offence. In Libya's opinion, this obligation was not duly complied with, because the United Kingdom only transmitted "a copy of the statement of the facts" against the accused, a document that "contains no evidence of which the Libyan judiciary could make use".

31. In this connection, the United Kingdom acknowledges that "Article 11, paragraph 1, differs from the other provisions on which Libya has relied, in that it does impose obligations on other States" and "is thus capable, *in the abstract*, of giving rise to a dispute between Libya and the United Kingdom". However, it maintains that it did not violate this provision, and claims in

particular that it "provided Libya with copies of the Scottish charges, the warrant for the arrest of the accused and the Statement of Facts prepared by the Lord Advocate". It also recalls that at the time when Libya presented its claims, Libya had not — any more than had the United Kingdom — invoked the Montreal Convention, and it concluded that, "For the failure of the United Kingdom to supply further information to Libya to constitute a violation of Article 11, the Convention must at least have been invoked by one of the States concerned."

32. Article 11 of the Montreal Convention is worded as follows:

> "***Article 11***
>
> 1. Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences. The law of the State requested shall apply in all cases.
>
> 2. The provisions of paragraph 1 of this Article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters."

33. Having taken account of the positions of the Parties as to the duties imposed by Article 11 of the Montreal Convention, the Court concludes that there equally exists between them a dispute which concerns the interpretation and application of that provision, and which, in accordance with Article 14, paragraph 1, of the Convention, falls to be decided by the Court..

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34. Libya, in the latest version of its submissions, finally asks the Court to find that

> "the United Kingdom is under a legal obligation to respect Libya's right not to have the [Montreal] Convention set aside by means which would in any case be at variance with the principles of the United Nations Charter and with the mandatory rules of general international law prohibiting the use of force and the violation of the sovereignty, territorial integrity, sovereign equality and political independence of

States."

35. The United Kingdom maintains that it is not for the Court, on the basis of Article 14, paragraph 1, of the Montreal Convention, to decide on the lawfulness of actions which are in any event in conformity with international law, and which were instituted by the Respondent to secure the surrender of the two alleged offenders. It concludes from this that the Court lacks jurisdiction over the submissions presented on this point by Libya.

36. The Court cannot uphold the line of argument thus formulated. Indeed, it is for the Court to decide, on the basis of Article 14, paragraph 1, of the Montreal Convention, on the lawfulness of the actions criticized by Libya, in so far as those actions would be at variance with the provisions of the Montreal Convention.

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37. In the present case, the United Kingdom has contended, however, that even if the Montreal Convention did confer on Libya the rights it claims, they could not be exercised in this case because they were superseded by Security Council resolutions 748 (1992) and 883 (1993) which, by virtue of Articles 25 and 103 of the United Nations Charter, have priority over all rights and obligations arising out of the Montreal Convention. The Respondent has also argued that, because of the adoption of those resolutions, the only dispute which existed from that point on was between Libya and the Security Council; this, clearly, would not be a dispute falling within the terms of Article 14, paragraph 1, of the Montreal Convention and thus not one which the Court could entertain.

38. The Court cannot uphold this line of argument. Security Council resolutions 748 (1992) and 883 (1993) were in fact adopted after the filing of the Application on 3 March 1992. In accordance with its established jurisprudence, if the Court had jurisdiction on that date, it continues to do so; the subsequent coming into existence of the above-mentioned resolutions cannot affect its jurisdiction once established (cf. *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 122; *Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 142).

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39. In the light of the foregoing, the Court concludes that the objection to jurisdiction raised by the United Kingdom on the basis of the alleged absence of a dispute between the Parties concerning the interpretation or application of the Montreal Convention must be rejected, and that the Court has jurisdiction to hear the disputes between Libya and the United Kingdom as to the interpretation or application of the provisions of that Convention.

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40. The Court will now proceed to consider the objection of the United Kingdom that the Libyan Application is not admissible.

41. The principal argument of the United Kingdom in this context is that

> "what Libya claims to be the issue or issues in dispute between it and the United Kingdom are now regulated by decisions of the Security Council, taken under Chapter VII of the Charter of the United Nations, which are binding on both Parties and that (if there is any conflict between what the resolutions require and rights or obligations alleged to arise under the Montreal Convention) the resolutions have overriding effect in accordance with Article 103 of the Charter".

In this connection, the United Kingdom explains that

> "resolutions 748 and 883 are legally binding and they create legal obligations for Libya and the United Kingdom which are determinative of any dispute over which the Court might have jurisdiction".

According to the United Kingdom, those resolutions require the surrender of the two suspects by Libya to the United Kingdom or the United States for trial, and this determination by the Security Council is binding on Libya irrespective of any rights it may have under the Montreal Convention. On this basis, the United Kingdom maintains that

> "the relief which Libya seeks from the Court under the Montreal Convention is not open to it, and that the Court should therefore exercise its power to declare the Libyan Application inadmissible".

The United Kingdom also argues that, should the Court be minded to consider the questions raised by Libya on the Montreal Convention without regard to the effect of the Security Council resolutions, it would find itself in the

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position of having to proceed to a consideration of the merits of those matters; if the Court were then to rule in favour of the position advanced by Libya, it would presumably pronounce judgment on that basis, although such a judgment would be neither applicable nor enforceable in view of prior decisions of the Security Council which remain in force.

The United Kingdom also adds that the terms of the resolutions concerned, as well as the relevant provisions of the Charter, have been fully argued before the Court. The Court would therefore need no further material deriving from argument on the merits to enable it to interpret the decisions of the Security Council or determine their effects.

42. For its part, Libya argues that it is clear from the actual terms of resolutions 731 (1992), 748 (1992) and 883 (1993) that the Security Council has never required it to surrender its nationals to the United Kingdom or the United States; it stated at the hearing that this remained "Libya's principal argument". It added that the Court must interpret those resolutions "in accordance with the Charter, which determined their validity" and that the Charter prohibited the Council from requiring Libya to hand over its nationals to the United Kingdom or the United States. Libya concludes that its Application is admissible "as the Court can usefully rule on the interpretation and application of the Montreal Convention . . . independently of the legal effects of resolutions 748 (1992) and 883 (1993)".

Libya also observes that the arguments of the United Kingdom based on the provisions of the Charter raise problems which do not possess an exclusively preliminary character, but appertain to the merits of the dispute. It argues in particular that the question of the effect of the Security Council resolutions is not of an exclusively preliminary character, inasmuch as the resolutions under consideration are relied upon by the United Kingdom in order to overcome the application of the Montreal Convention, and since Libya is justified in disputing that these resolutions are opposable to it.

43. Libya furthermore draws the Court's attention to the principle that "The critical date for determining the admissibility of an application is the date on which it is filed" (*Border and Transborder Armed Actions, (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, I.C.J. Reports 1988*, p. 95, para. 66). It points out in this connection that its Application was filed on 3 March 1992; that Security Council resolutions 748 (1992) and 883 (1993) were adopted on 31 March 1992 and 11 November 1993, respectively; and that resolution 731 (1992) of 21 January 1992 was not adopted under Chapter VII of the United Nations Charter and was only a mere recommendation. Consequently, Libya argues, its Application is admissible in any event.

44. In the view of the Court, this last submission of Libya must be upheld. The date, 3 March 1992, on which Libya filed its Application, is in fact the only relevant date for determining the admissibility of the Application. Security Council resolutions 748 (1992) and 883 (1993) cannot be taken into consideration in this regard since they were adopted at a later date. As to Security Council resolution 731 (1992), adopted before the filing of the Application, it could not form a legal impediment to the admissibility of the latter because it was a mere recommendation without binding effect, as was recognized moreover by the United Kingdom itself. Consequently, Libya's Application cannot be held inadmissible on these grounds.

45. In the light of the foregoing, the Court concludes that the objection to admissibility derived by the United Kingdom from Security Council resolutions 748 (1992) and 883 (1993) must be rejected, and that Libya's Application is admissible.

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46. In dealing with admissibility, the Agent of the United Kingdom also stated that his Government "ask[ed] the Court to rule that the intervening resolutions of the Security Council have rendered the Libyan claims without object".

The Court has already acknowledged, on several occasions in the past, that events subsequent to the filing of an application may "render an application without object" (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988, p. 95*, para. 66) and "therefore the Court is not called upon to give a decision thereon" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 272, para. 62) (cf. *Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 38).

In the present case, the United Kingdom puts forward an objection aimed at obtaining from the Court a decision not to proceed to judgment on the merits, which objection must be examined within the framework of this jurisprudence.

47. The Court must satisfy itself that such an objection does indeed fall within the provisions of Article 79 of the Rules, relied upon by the Respondent. In paragraph 1, this Article refers to "Any objection . . . to the jurisdiction of the Court or to the admissibility of the application, *or other objection*" (emphasis added); its field of application *ratione materiae* is thus not limited solely to objections regarding jurisdiction or admissibility. However, if it is to be

covered by Article 79, an objection must also possess a "preliminary" character. Paragraph 1 of Article 79 of the Rules of Court characterizes as "preliminary" an objection "the decision upon which is requested before any further proceedings". There can be no doubt that the objection envisaged here formally meets this condition. The Court would also indicate that, in this instance, the Respondent is advancing the argument that the decisions of the Security Council could not form the subject of any contentious proceedings before the Court, since they allegedly determine the rights which the Applicant claims to derive from a treaty text, or at least that they directly affect those rights; and that the Respondent thus aims to preclude at the outset any consideration by the Court of the claims submitted by the Applicant and immediately terminate the proceedings brought by it. In so far as the purpose of the objection raised by the United Kingdom that there is no ground for proceeding to judgment on the merits is, effectively, to prevent, *in limine*, any consideration of the case on the merits, so that its "effect [would] be, if the objection is upheld, to interrupt further proceedings in the case", and "it [would] therefore be appropriate for the Court to deal with [it] before enquiring into the merits" (*Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B, No. 76*, p. 16), this objection possesses a preliminary character and does indeed fall within the provisions of Article 79 of the Rules of Court.

Moreover, it is incontrovertible that the objection concerned was submitted in writing within the time-limit fixed for the filing of the Counter-Memorial, and was thus submitted in accordance with the formal conditions laid down in Article 79.

48. Libya does not dispute any of these points. It does not contend that the objection derived by the United Kingdom from Security Council resolutions 748 (1992) and 883 (1993) is an objection on the merits, which does not fall within the provisions of Article 79 of the Rules of Court, nor does it claim that the objection was not properly submitted. What Libya contends is that this objection falls within the category of those which paragraph 7 of Article 79 of the Rules of Court characterizes as objections "not possess[ing], in the circumstances of the case, an exclusively preliminary character" (see paragraph 42 above).

On the contrary, the United Kingdom considers that the objection concerned possesses an "exclusively preliminary character" within the meaning of that provision; and, at the hearing, its Agent insisted on the need for the Court to avoid any proceedings on the merits, which to his mind were not only "likely to be lengthy and costly" but also, by virtue of the difficulty that "the handling of evidentiary material . . . might raise serious problems".

Thus it is on the question of the "exclusively" or "non-exclusively" preliminary character of the objection here considered that the Parties are divided and on which the Court must now make a determination.

49. The present wording of Article 79, paragraph 7, of the Rules of Court was adopted by the Court in 1972. The Court has had occasion to examine its precise scope and significance in the Judgments it delivered in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America)*, on 26 November 1984 (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 425-426) and on 26 June 1986 (*Merits, Judgment, I.C.J. Reports 1986*, pp. 29-31), respectively. As the Court pointed out in the second of those Judgments,

> "Under the Rules of Court dating back to 1936 (which on this point reflected still earlier practice), the Court had the power to join an objection to the merits 'whenever the interests of the good administration of justice require it' (*Panevezys-Saldutiskis Railway, P.C.I.J., Series A/B, No. 75*, p. 56), and in particular where the Court, if it were to decide on the objection, 'would run the risk of adjudicating on questions which appertain to the merits of the case or of prejudging their solution' *(ibid.)* (*I.C.J. Reports 1986*, pp. 29-30, para. 39).

However, the exercise of that power carried a risk,

> "namely that the Court would ultimately decide the case on the preliminary objection, after requiring the parties to fully plead the merits — and this did in fact occur (*Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3). The result was regarded in some quarters as an unnecessary prolongation of an expensive and time-consuming procedure" (*ibid.* p. 30, para. 39).

The Court was then faced with the following choice: "to revise the Rules so as to exclude for the future the possibility of joinder to the merits, so that every objection would have to be resolved at the preliminary stage, or to seek a solution which would be more flexible" (*ibid.*, p. 30, para. 40). The solution adopted in 1972 was ultimately not to exclude the power to examine a preliminary objection in the merits phase, but to limit the exercise of that power, by laying down the conditions more strictly. The Court concluded, in relation to the new provision thus adopted:

> "It thus presents one clear advantage: that it qualifies certain objections as preliminary, making it clear that when they are exclusively of that character they will have to be decided upon immediately, but if they are not, especially when the character of the objections is not exclusively preliminary because they contain both

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> preliminary aspects and other aspects relating to the merits, they will have to be dealt with at the stage of the merits. This approach also tends to discourage the unnecessary prolongation of proceedings at the jurisdictional stage." (*Ibid.*, p. 31, para. 41.)

50. The Court must therefore ascertain whether, in the present case, the United Kingdom's objection based on the Security Council decisions contains "both preliminary aspects and other aspects relating to the merits" or not.

That objection relates to many aspects of the dispute. By maintaining that Security Council resolutions 748 (1992) and 883 (1993) have rendered the Libyan claims without object, the United Kingdom seeks to obtain from the Court a decision not to proceed to judgment on the merits, which would immediately terminate the proceedings. However, by requesting such a decision, the United Kingdom is requesting, in reality, at least two others which the decision not to proceed to judgment on the merits would necessarily postulate: on the one hand a decision establishing that the rights claimed by Libya under the Montreal Convention are incompatible with its obligations under the Security Council resolutions; and, on the other hand, a decision that those obligations prevail over those rights by virtue of Articles 25 and 103 of the Charter.

The Court therefore has no doubt that Libya's rights on the merits would not only be affected by a decision, at this stage of the proceedings, not to proceed to judgment on the merits, but would constitute, in many respects, the very subject-matter of that decision. The objection raised by the United Kingdom on that point has the character of a defence on the merits. In the view of the Court, this objection does much more than "touch[ing] upon subjects belonging to the merits of the case" (*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 15); it is "inextricably interwoven" with the merits (*Barcelona Traction, Light and Power Company, Limited Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 46).

The Court notes furthermore that the United Kingdom itself broached many substantive problems in its written and oral pleadings in this phase, and pointed out that those problems had been the subject of exhaustive exchanges before the Court; the United Kingdom Government thus implicitly acknowledged that the objection raised and the merits of the case were "closely interconnected" (*Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 46, and the reference to *Pajzs, Csáky, Esterházy, Order of 23 May 1936, P.C.I.J., Series A/B, No. 66* , p. 9).

If the Court were to rule on that objection, it would therefore inevitably be ruling on the merits; in relying on the provisions of Article 79 of the Rules of Court, the Respondent has set in motion a procedure the precise aim of which is to prevent the Court from so doing.

The Court concludes from the foregoing that the objection of the United Kingdom according to which the Libyan claims have been rendered without object does not have "an exclusively preliminary character" within the meaning of that Article.

51. Having established its jurisdiction and concluded that the Application is admissible, the Court will be able to consider this objection when it reaches the merits of the case.

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52. In accordance with Article 79, paragraph 7, of the Rules of Court, time-limits for the further proceedings shall be fixed subsequently by the Court.

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53. For these reasons:

THE COURT,

(1) *(a)* by thirteen votes to three, *rejects* the objection to jurisdiction raised by the United Kingdom on the basis of the alleged absence of a dispute between the Parties concerning the interpretation or application of the Montreal Convention of 23 September 1971;

IN FAVOUR: *Vice-President* Weeramantry, *Acting President; Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc El-Kosheri;

AGAINST: *President* Schwebel; *Judge* Oda; *Judge* ad hoc Sir Robert Jennings;

(b) by thirteen votes to three, *finds* that it has jurisdiction, on the basis of Article 14, paragraph 1, of the Montreal Convention of 23 September 1971, to hear the disputes between Libya and the United Kingdom as to the interpretation or application of the provisions of that Convention;

> IN FAVOUR: *Vice-President* Weeramantry, *Acting President; Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc El-Kosheri;
>
> AGAINST: *President* Schwebel; *Judge* Oda; *Judge* ad hoc Sir Robert Jennings;

(2) *(a)* by twelve votes to four, *rejects* the objection to admissibility derived by the United Kingdom from Security Council resolutions 748 (1992) and 883 (1993);

> IN FAVOUR: *Vice-President* Weeramantry, *Acting President; Judges* Bedjaoui, Guillaume, Ranjeva, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc El-Kosheri;
>
> AGAINST: *President* Schwebel; *Judges* Oda, Herczegh; *Judge* ad hoc Sir Robert Jennings;

(b) by twelve votes to four, *finds* that the Application filed by Libya on 3 March 1992 is admissible.

> IN FAVOUR: *Vice-President* Weeramantry, *Acting President; Judges* Bedjaoui, Guillaume, Ranjeva, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc El-Kosheri;
>
> AGAINST: *President* Schwebel; *Judges* Oda, Herczegh; *Judge* ad hoc Sir Robert Jennings;

(3) by ten votes to six, *declares* that the objection raised by the United Kingdom according to which Security Council resolutions 748 (1992) and 883 (1993) have rendered the claims of Libya without object does not, in the circumstances of the case, have an exclusively preliminary character.

> IN FAVOUR: *Vice-President* Weeramantry, *Acting President; Judges* Bedjaoui, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc El-Kosheri;
>
> AGAINST: *President* Schwebel; *Judges* Oda, Guillaume, Herczegh, Fleischhauer; *Judge* ad hoc Sir Robert Jennings.

Done in English and in French, the English text being authoritative, at the Peace Palace, The Hague, this twenty-seventh day of February, one thousand nine hundred and ninety-eight, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Great Arab Libyan Jamahiriya and the Government of the United Kingdom of Great Britain and Northern Ireland, respectively.

(Signed) Christopher G. WEERAMANTRY,
Vice-President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

Judges BEDJAOUI, GUILLAUME and RANJEVA append a joint declaration to the Judgment of the Court; Judges BEDJAOUI, RANJEVA and KOROMA append a joint declaration to the Judgment of the Court; Judges GUILLAUME and FLEISCHHAUER append a joint declaration to the Judgment of the Court; Judge HERCZEGH appends a declaration to the Judgment of the Court.

Judges KOOIJMANS and REZEK append separate opinions to the Judgment of the Court.

President SCHWEBEL, Judge ODA and Judge *ad hoc* Sir Robert JENNINGS append dissenting opinions to the Judgment of the Court

(Initialled) C.G.W

(Initialled) E.V.O

Where a declaration or opinion has been submitted in the two official languages of the Court, both texts are reproduced hereafter.

Where a declaration or opinion has been submitted in one of the two official languages of the Court, its translation by the Registry into the other official language will appear in the printed version of the Judgment.

DECLARATION DE M. HERCZEGH

Ayant voté contre les paragraphes 2, lettres *a)* et *b)*, et 3 du dispositif, je me sens obligé de fournir les explications suivantes :

1. Je partage la conclusion de la Cour qu'il existe entre les Parties des différends concernant l'interprétation et l'application de l'article 7 — lu conjointement avec l'article premier, les paragraphes 2 et 3 de l'article 5, l'article 6 et l'article 8 — et de l'article 11 de la convention de Montréal, différends qui doivent être tranchés conformément au paragraphe 1 de l'article 14 de la convention de Montréal. La Cour est dès lors compétente pour connaître de ces différends.

2. Au contraire, je ne peux m'associer à la décision de la Cour déclarant la requête de la Libye recevable et rejetant l'exception du défendeur selon laquelle les résolutions 748 (1992) et 883 (1993) du Conseil de sécurité sont déterminantes pour tous les différends sur lesquels la Cour pourrait avoir compétence; et ce au motif que lesdites résolutions auraient été adoptées à une date postérieure au dépôt de la requête. La Cour avait indiqué, dans l'affaire relative à des *Actions armées frontalières et transfrontalières (Nicaragua c. Honduras)*, que «[l]a date critique à retenir pour déterminer la recevabilité d'une requête est celle de son dépôt» (*C.I.J. Recueil 1988*, p. 95, par. 66). Toutefois, dans la même affaire et dans le même paragraphe, la Cour s'est exprimée de la manière suivante :

> «Il peut toutefois être nécessaire, pour déterminer avec certitude qu'elle était la situation à la date du dépôt de la requête, d'examiner les événements, et en particulier les relations entre les parties, pendant une période antérieure à cette date, voire pendant la période qui a suivi. En outre, il se peut que les événements privent ensuite la requête de son objet ou qu'ils prennent même une tournure telle qu'une nouvelle requête ne pourrait par la suite être déposée dans des termes analogues.» (*Ibid.*)

Il ressort du raisonnement de la Cour cité ci-dessus que la date du dépôt d'une requête pour déterminer sa recevabilité constitue certainement un facteur très important, mais que celui-ci doit être envisagé à la lumière des événements pertinents antérieurs et postérieurs.

Parmi les événements antérieurs au dépôt de la requête libyenne, il faut en particulier mentionner la résolution 731 du Conseil de sécurité adoptée le 21 janvier 1992. Il est vrai que cette résolution ne précise pas en vertu de quel chapitre de la Charte des Nations Unies elle a été prise. Ayant le caractère d'une recommandation, elle ne crée pas des obligations contraignantes pour les Membres de l'Organisation des Nations Unies. Toutefois, il convient de la prendre d'autant plus en considération que les deux résolutions 748 (1992) et 883 (1993) du Conseil de sécurité, prises cette fois en vertu du chapitre VII de la Charte, se réfèrent explicitement à la résolution 731 (1992) et reprennent l'essentiel de son contenu.

Pour ce qui est des événements postérieurs au dépôt de la requête de la Libye, il faut souligner que celle-ci a été privée de son objet par les deux résolutions du Conseil de sécurité ayant force obligatoire. La requête aurait dû par suite être rejetée. On observera que la Cour se prononce sur la recevabilité plusieurs années après que la requête a été privée de son objet. C'est le fruit, à mon avis, d'un formalisme tout à fait étranger à la jurisprudence de la Cour que de considérer aujourd'hui ladite requête comme recevable. La Cour, dans l'affaire du *Cameroun septentrional*, a déclaré ce qui suit :

> «Qu'au moment où la requête a été déposée la Cour ait eu ou non compétence pour trancher le différend qui lui était soumis, il reste que les circonstances qui se sont produites depuis lors rendent toute décision judiciaire sans objet.» (*C.I.J. Recueil 1963*, p. 38.)

En l'affaire des *Essais nucléaires (Australie c. France)*, elle a affirmé qu'elle

> «ne voit ... pas de raison de laisser se poursuivre une procédure qu'elle sait condamnée à rester stérile» (*C.I.J. Recueil 1974*, p. 271, par. 58).

3. La Cour a conclu en outre que l'exception soulevée par le défendeur n'est pas une exception à la compétence de la Cour ou à la recevabilité de la requête, mais une «autre exception» qui ne présenterait pas un caractère exclusivement préliminaire (cf. Règlement, article 79, paragraphes 1 et 7). Je regrette de ne pouvoir me rallier à l'argumentation de la Cour, qui se présente comme suit : en sollicitant une décision de non-lieu qui mettrait immédiatement fin à l'instance, le défendeur

> «en sollicite, en réalité, au moins deux autres, que le prononcé d'un non-lieu postulerait nécessairement : d'une part une décision établissant que les droits revendiqués par la Libye aux termes de la convention de Montréal sont incompatibles avec les obligations découlant pour elle des résolutions du Conseil de sécurité; et d'autre part une décision faisant prévaloir ces obligations

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> sur ces droits par le jeu des articles 25 et 103 de la Charte... L'exception soulevée ... sur ce point a le caractère d'une défense au fond.» (Paragraphe 50 de l'arrêt.)

L'admission d'une exception préliminaire a sans aucun doute des effets quant à la *jouissance* des droits que le demandeur prétend avoir dans ses rapports avec le défendeur, sans que l'*existence* ou le *contenu* de ces droits soient remis en question. Les conséquences indirectes de l'admission d'une exception ne peuvent être considérées comme déterminatives du caractère exclusivement préliminaire ou non d'une telle exception, au sens du paragraphe 7 de l'article 79 du Règlement. En l'espèce, la Cour n'a pas à se prononcer sur l'interprétation ou l'application des articles 7 et 11 de la convention de Montréal. La question de savoir si les droits et obligations des Parties, dans les circonstances de l'affaire, sont régis par la Charte des Nations Unies et par des résolutions prises en vertu des dispositions de la Charte n'affecte en rien les dispositions de la convention de Montréal pour l'interprétation ou l'application desquelles la Cour a compétence; elle présente en conséquence un caractère exclusivement préliminaire. Il n'est pas douteux que les obligations des Membres des Nations Unies en vertu de la Charte — y compris les obligations que les décisions du Conseil de sécurité créent à l'égard de ceux-ci — prévalent sur leurs obligations souscrites en vertu d'autres accords internationaux. Au terme de la phase des mesures conservatoires, la Cour, dans son ordonnance du 15 avril 1992, a déjà fait une telle constatation (*C.I.J. Recueil 1992*, p. 15, par. 39).

Mes conclusions sont les suivantes : la Cour est compétente pour connaître des différends existant entre les Parties quant à l'interprétation ou à l'application des dispositions pertinentes de la convention de Montréal; les demandes libyennes auraient dû être considérées comme régies par les résolutions obligatoires du Conseil de sécurité; et l'exception préliminaire soulevée par le défendeur à cet égard, et qui a un caractère exclusivement préliminaire, aurait dû être retenue. La requête de la Libye, devenue sans objet, aurait dû par suite être rejetée.

(Signé) Géza HERCZEGH

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SEPARATE OPINION OF JUDGE KOOIJMANS

1 I have voted in favour of the operational part of the Judgment since I concur with the Court's finding that it has jurisdiction to entertain the claim as submitted by Libya and that this claim is admissible. I also share the view expressed in the Judgment that a number of the objections submitted by the Respondent do not have an exclusively preliminary character. Since, however, the Judgment does not reflect fully my own considerations I wish to place on record my views on some specific arguments brought forward by the Parties. I will do so rather succinctly with regard to the objections to the jurisdiction of the Court and in a slightly more comprehensive way with regard to the objections to the admissibility of the claim and to the objection that the Libyan claims have been rendered without object, or that Libya is precluded from obtaining the relief it seeks, by the subsequent adoption of Security Council resolutions 748 (1992) and 883 (1993).

(i) *Jurisdictional issues*

2. It would be a truism to contend that the present case is a politically highly sensitive one. As the Court has stated many times before, the fact that a dispute brought before it has serious political overtones does not act as a bar to the Court's entertaining it, nor does the fact that the dispute is being dealt with simultaneously by the Security Council.

In the present case the Respondent has gone further than pointing out merely these elements. It has intimated that Libya has not invoked the Court's jurisdiction under the Montreal Convention in order to settle a dispute which has arisen under that Convention but for other — quite unconnected — reasons. During the hearings held on 13 October 1997 the Agent of the United Kingdom said:

> "what the Applicant is seeking by these proceedings is simply not a Montreal Convention matter, but a scarcely veiled attempt to frustrate the exercise by the Security Council of its responsibilities under the United Nations Charter" (CR 97/16, p. 16, Berman)

3 The Respondent not only denies that there exists a dispute with Libya on the interpretation or application of the Montreal Convention, it also casts serious doubts on Libya's motives to construe such a dispute, the Court should not allow itself to be lured into such a politically-inspired hoax. I have chosen the rather extreme wording of this last sentence on purpose in order to show how easily the Court can be portrayed as an instrument used by one of the Parties for extrajudicial purposes. And this risk becomes an acute danger if the impression arises that the Court is used as a pawn in a game of chess where other principal organs of the United Nations play a role.

4. Against this background it seems proper and worthwhile to point out once more what is the function of the Court according to the Charter and its Statute, which forms an integral part of that Charter. This function was described in apposite terms by the Court itself in its Judgment of 20 December 1988 in the *Border and Transborder Armed Actions* case

> "the Court is aware that political aspects may be present in any legal dispute brought before it. The Court, as a judicial organ, is however only concerned to establish, first, that the dispute before it is a legal dispute, in the sense of a dispute capable of being settled by the application of principles and rules of international law, and secondly, that the Court has jurisdiction to deal with it, and that that jurisdiction is not fettered by any circumstance rendering the application inadmissible. The purpose of recourse to the Court is the peaceful settlement of disputes; the Court's judgment is a legal pronouncement, and it cannot concern itself with the political motivation which may lead a state at a particular time, or in particular circumstances, to choose judicial settlement" (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 91, para. 52).

5 Whether the eventual finding of the Court on the merits is compatible with binding decisions of other United Nations organs, in particular the Security Council, is quite another matter and in the Court's view must be considered at a later stage. The first task of the Court after a case is submitted to it is to consider whether the case concerns a legal dispute and whether it has jurisdiction to deal with it. As the Court said in the *Nuclear Tests* cases. "the existence of a dispute is the primary condition for the Court to exercise its judicial function". The Court went on to say that "it is not sufficient for one party to assert that there is a dispute", nor, it may be added, is it sufficient that the other party denies that there is a dispute. Referring to what is said in the case concerning *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (*I.C.J. Reports 1950*, p. 74), the Court stated that "whether there exists an international dispute is a matter for objective determination" by it (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 270, para. 55).

6 If the Court, therefore, is determining the existence or the non-existence of a legal dispute, it is carrying out its proper judicial function. In this respect it is in my view not relevant that the Respondent does not rely on the Montreal Convention and contends that it has no dispute with Libya concerning its interpretation or application. It is not in dispute between the Parties that the facts of the Lockerbie incident as such may be characterized as an act

defined in Article 1 of the Montreal Convention which would imply that the Convention could be applicable to that incident and — under normal circumstances — would be applicable. The Respondent has stated that this does not mean that no other rules of international law are applicable to these facts and by bringing the situation to the attention of the Security Council as a potential threat to peace and security resulting from State involvement in acts of terrorism it has relied on the provisions of the United Nations Charter. Under such circumstances the Montreal Convention would not be the only and exclusively applicable instrument as is contended by the Applicant.

7. The resulting difference of opinion is therefore not an abstract disagreement about the applicability of the Montreal Convention, it is a very precise legal dispute about its applicability to the very facts of the case before the Court. The fact that the Security Council by adopting resolution 731 implicitly denied the Convention's applicability to these facts can in no way detract from the Court's own competence and its own responsibility to determine whether the dispute as submitted by the Applicant is a justiciable dispute within the terms of Article 14, paragraph 1, of the Montreal Convention, the settlement of which is entrusted to the Court. To conclude otherwise would impair the proper function of the Court as it is determined in the Charter and the Statute. By implication the Court has also jurisdiction to entertain the claims by Libya that the Respondents have not respected Libya's rights under Article 7 of the Convention, respectively their own obligations under Article 11, since these are the specific claims submitted by the Applicant. Whether the Court will have to deal with these specific claims will, of course, depend upon the Court's finding on the preliminary question of the Convention's applicability in view of the resolutions of the Security Council.

8. The Court's jurisdiction in my view is confined to the issues just mentioned which are covered by the terms of Article 14, paragraph 1, of the Montreal Convention, viz., the issues of applicability and compliance or non-compliance. In particular the ways and means by which this non-compliance is practised and the question whether these ways and means are at variance with the Charter of the United Nations and with mandatory rules of general international law do not come within the Court's jurisdiction as consensually agreed upon in Article 14, paragraph 1, of the Convention.

9. I, therefore, fully agree with the Court's finding that it has jurisdiction to hear the dispute between the Applicant and the Respondent in accordance with Article 14, paragraph 1, of the Montreal Convention. That I nevertheless have expressed some personal views on the issue of jurisdiction is because I deem it important to point out that in this regard the competences of the Security Council and the Court are separate and clearly distinguishable, and should not be confused, let alone be seen as potentially conflicting with each other. Just as each State is entitled to bring a situation to the attention of the Security Council and the Council is entitled to give its views on that situation and to qualify it as a threat to international peace and security, so each State is entitled to submit to the Court a claim against another State with regard to a dispute which in its opinion is justiciable. It is for the Court and only for the Court to determine whether it is competent to entertain the claim on the basis of the relevant legal provisions.

(ii) *Issues of admissibility and mootness*

10. Whether the Court, once it has assumed jurisdiction, should carry out its judicial function under all circumstances, is quite a different matter. The Respondent has submitted that any rights which Libya might have under the Montreal Convention are in any event superseded by its obligations under Security Council resolutions 748 (1992) and 883 (1993) which were adopted after the date of the filing of Libya's Application. Consequently, any judgment on the merits would be an empty one because it would be neither applicable nor enforceable.

11. It seems to be a question of minor relevance whether this objection must be called an objection to the admissibility and consequently must be rejected since these resolutions were adopted after the date of the filing of the Application which according to the Judgment is the only relevant date for determining the admissibility or whether it must be qualified as an "objection the decision upon which must be determined before any further proceedings" in the sense of Article 79, paragraph 1, of the Rules of Court.

12. It may be questioned whether it is necessary or even possible to give a neat categorization of preliminary objections. S. Rosenne says in this respect:

> "All that can be deduced from experience is that it is an individual matter to be appreciated in the light of all the circumstances of each case." (S. Rosenne, *The Law and Practice of the International Court of Justice 1920-1996*, 1997, p. 883.)

In this respect reference may be made also to the *Northern Cameroons* case where the Court, commenting on the various meanings ascribed by the Parties to, *inter alia*, the term "admissibility" said:

> "The Court recognizes that these words in differing contexts may have various connotations but it does not find it necessary in the present case to explore the meaning of these terms. For the purposes of the present case, a factual analysis undertaken in the light of certain guiding principles may suffice to conduce to the resolution of the issues to which the Court directs its attention." (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 28.)

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13. Irrespective of the question whether preliminary objections should be distinguished as to category, this contextual analysis is exactly what the Court has undertaken in the present Judgment. Taking into account all circumstances of the case it has come to the conclusion that the objection that Security Council resolutions 748 (1992) and 883 (1993) have rendered the Libyan claim without object is an objection which possesses a preliminary character and falls within the provisions of Article 79 of the Rules of Court. Nevertheless, the Court has concluded that this objection does not have an exclusively preliminary character within the meaning of Article 79, paragraph 7, and, therefore, should be considered at the stage of the merits.

14. I share this view of the Court. I have, however, the feeling that some additional remarks would be appropriate in light of the fact that the Respondent has not denied that this objection may touch upon the merits. They are of the opinion that the case should nevertheless be terminated at the present stage as any judgment on the merits would be without practical effect since the relief sought by Libya cannot be provided by the Court because of the overriding legal effects of the mandatory resolutions of the Security Council.

Counsel for the United Kingdom stated that it would not be a proper exercise of the judicial function if the Court would pronounce a judgment which would be an empty one because it was neither applicable nor enforceable given the terms of prior decisions of the Security Council which remained in force (CR 97/16, p. 60).

In this respect reference was made to the Court's finding in the *Northern Cameroons* case, where it said:

> "The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations." (*I.C.J. Reports 1963*, p. 34.)

15. It seems questionable, however, whether this reference to the *Northern Cameroons* case is correct. The Court's reasoning was based on the argument that a judgment on the merits would not be a judgment capable of effective application since the decision of the General Assembly (res. 1608 (XV)) to terminate the Trusteeship over the British Cameroons (which mooted the case between the United Kingdom and the Republic of Cameroon) was an administrative measure of a determinative and final character. A finding of a breach of law by the Court could not lead to redress as the General Assembly was no longer competent with regard to the Territory pursuant to the termination of the Trusteeship as a result of resolution 1608 (XV) and consequently no determination reached by the Court could be given effect by the former Administering Authority (*ibid.*, p. 35).

16. The *Northern Cameroons* case makes clear that a decision that a claim no longer has any object can only be made within a highly concrete context. It are "the circumstances which have arisen" which bring the Court to the determination that "it does not enter into the adjudicatory functions of the Court to deal with issues *in abstracto*, once it has reached the conclusion that the merits of the case no longer fall to be determined" (*I.C.J. Reports 1974*, p. 272).

17. In the present case circumstances are different: there is no administrative measure of a determinative and final character taken by an organ of the United Nations. Resolutions of the Security Council taken under Chapter VII of the Charter may have far-reaching legal effects, but they are not irrevocable or unalterable. In the exercise of its function the Security Council is free to confirm, revoke or amend them and consequently they cannot be called "final" even if during their lifetime they may be dispositive of the rights and obligations of member States, overriding rights and obligations these States may have under other treaties. It is generally agreed that the Security Council has full competence under Chapter VII to determine that a factual situation constitutes a threat to international peace and security and that it may take the necessary legally binding measures to counter that threat, but that it has no competence to determine the law, whereas it has been questioned whether the Council can modify the law when applying it to a particular set of facts (see e.g. Malcolm Shaw, *The Security Council and the International Court of Justice: Judicial Drift and Judicial Function*, in A.S. Muller a.o. (eds.), *The International Court of Justice - Its Future Role after Fifty Years*, 1997, pp. 219 ff.).

18. Since Security Council resolutions 748 (1992) and 883 (1992) have authoritatively but *not definitively* and for an indefinite period of time determined the matters at issue, the Court rightly concluded that the objection by the Respondent that the Libyan claims are without object does not have "an exclusively preliminary character" and will be considered by the Court when it reaches the merits of the case. By doing so the Court has upheld its function as it is defined in Article 38 of the Statute, viz., "to decide in accordance with international law such disputes as are submitted to it", at the same time respecting fully the competences which the Security Council has under the Charter.

19. Distinguishing carefully the proper functions of both Security Council and Court in my view is essential for what Judge Lachs called "a fruitful interaction" between these two main organs of the United Nations. These functions are complementary and in that sense can be mutually supportive.

(iii) *Concluding remarks*

20. One final remark may be made. The Respondent has invoked the concept of "judicial economy" when

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advocating a dismissal of the case in the preliminary phase. It has warned for proceedings on the merits which make it necessary for the Court to address complex issues of fact and added that the case should be disposed of at the preliminary phase because the Council resolutions would have rendered it without object. It cannot be excluded that this might be the case indeed, although this is by no means certain as it was in the *Northern Cameroons* case.

21. Judicial economy however may go to the detriment of judicial propriety which asks for a careful weighing of the interests of all parties to the dispute. In this respect it is worthwhile to recall what Judge Read said in his dissenting opinion in the *Anglo-Iranian Oil Company* case:

> "It is impossible to overlook the grave injustice which would be done to an applicant State, by a judgment upholding an objection to the jurisdiction and refusing to permit adjudication on the merits, and which, at the same time, decided an important issue of fact or law, forming part of the merits, against the applicant State. The effect of refusal to permit adjudication of the dispute would be to remit the applicant and respondent States to other measures, legal or political, for the settlement of the dispute. *Neither the applicant nor the respondent should be prejudiced, in seeking an alternative solution of the dispute, by the decision of any issue of fact or law that pertains to the merits.*" (Emphasis added.) (*I.C.J. Reports 1952*, p. 149.)

22. It certainly cannot be foreseen that alternative solutions, e.g., on the basis of suggestions made by regional organizations or other international or national groupings, will be found and at present that may even seem improbable but neither can it be excluded. The Court should not be seen as standing in the way of any conciliatory effort.

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OPINION INDIVIDUELLE DE M. REZEK

1. Puisque l'Etat défendeur, en contestant ainsi tant la compétence de la Cour que la recevabilité de la requête, a mis l'accent sur la force obligatoire et la primauté des résolutions 748 (1992) et 883 (1993) du Conseil de sécurité à la lumière des articles 25 et 103 de la Charte des Nations Unies, je suis d'avis que l'arrêt auquel je souscris rendrait plus complètement compte de l'argumentation des Parties s'il consacrait quelques lignes au thème de la compétence de la Cour par rapport à celle des organes politiques de l'Organisation.

2. L'article 103 de la Charte est une règle de solution de conflit entre traités : il présuppose avant tout l'existence d'une opposition entre la Charte des Nations Unies et un autre engagement conventionnel. Il résout le conflit en faveur de la Charte, sans égard à la chronologie des textes. Mais il n'entend pas opérer au détriment du droit international coutumier et moins encore au préjudice des principes généraux du droit des gens. Et c'est bien la Charte des Nations Unies (non une résolution du Conseil de sécurité, une recommandation de l'Assemblée générale ou un arrêt de la Cour internationale de Justice) qui bénéficie de la primauté établie dans cette norme : c'est la Charte avec tout le poids de ses principes, de son système et de la répartition de compétences qu'elle réalise.

3. D'autre part, la Cour est l'interprète définitif de la Charte des Nations Unies. C'est à la Cour qu'il appartient de procéder à la détermination du sens de chacune de ses prescriptions et de l'ensemble du texte, et il s'agit là d'une responsabilité qui devient particulièrement grave lorsque la Cour est confrontée à la mise en question de décisions de l'un des deux organes politiques principaux de l'Organisation. Veiller à assurer la primauté de la Charte dans son sens précis et complet est parmi les tâches incombant à la Cour une des plus éminentes et la Cour, de plein droit et par devoir, fait en sorte qu'il en soit ainsi chaque fois que l'occasion se présente, même si cela peut en théorie conduire à la critique d'un autre organe des Nations Unies, ou plutôt au désaveu de l'exégèse de la Charte que fait cet organe.

Lors de l'affaire du *Timor oriental*, M. Skubiszewski a eu l'occasion de rappeler :

> «La Cour est compétente, ainsi que le montrent plusieurs arrêts et avis consultatifs, pour interpréter et appliquer les résolutions de l'Organisation. Elle est compétente pour se prononcer sur leur légalité, et notamment sur la question de savoir si elles sont *intra vires*. Cette compétence découle de la fonction de la Cour en tant qu'organe judiciaire principal de l'Organisation des Nations Unies. Les décisions de l'Organisation (au sens large que cette notion a en vertu des dispositions de la Charte relatives au vote) peuvent être examinées par la Cour du point de vue de leur légalité, de leur validité et de leur effet. Les conclusions de la Cour sur ces questions mettent en cause les intérêts de tous les Etats Membres, ou du moins de ceux qui sont visés par les résolutions en question. Mais ces conclusions restent dans les limites fixées par la règle énoncée dans l'affaire de l'*Or monétaire*. En évaluant les diverses résolutions de l'Organisation des Nations Unies concernant le Timor oriental par rapport aux droits et aux devoirs de l'Australie, la Cour ne contreviendrait pas à la règle du fondement consensuel de sa compétence.» (*C.I.J. Recueil 1995*, p. 251.)

Dans le passé, des juges aussi pondérés que sir Gerald Fitzmaurice ont fait état de cette compétence, et l'autorité de la doctrine allait dans le même sens. Il y a bien longtemps que M. Olivier Lissitzyn proposait :

> «If the organization is to gain strength, the authority to give binding interpretations of the Charter, at least in matters directly affecting the rights and duties of states, must be lodged somewhere, preferably in a judicial organ. The long-range purposes and policies laid down in the Charter must be given some protection against the possible short-range aberrations of the political organs. Power without law is despotism.» (O. J. Lissitzyn, *The International Court of Justice*, New York, 1951, pp. 96-97.)

La thèse suivant laquelle le contrôle judiciaire de l'interprétation de la Charte auquel a procédé un organe politique ne peut se faire que dans l'exercice de la compétence consultative est totalement dénuée de fondement scientifique. Il est seulement vrai qu'aucun Etat n'est autorisé par le système à consulter la Cour sur une question constitutionnelle des Nations Unies ni à soulever une telle question par le biais d'une action *directe* contre l'Organisation ou contre un organe comme le Conseil de sécurité. Mais la question constitutionnelle — ayant trait, par exemple, à un cas d'excès de pouvoir — peut parfaitement se poser dans le contexte du contentieux entre Etats. Il est fort naturel, dans un tel cadre, que la requête soit dirigée contre l'Etat qui, pour une raison quelconque, aurait pris à sa charge d'exécuter l'acte du Conseil, bien que cet acte fut contesté au regard de la Charte ou de n'importe quelle norme du droit international général. Le sujet passif de l'action n'est point donc le législateur, mais l'exécuteur immédiat de la loi, tel que cela se produit d'ordinaire,

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devant les juridictions internes, dans le cadre d'une procédure d'*habeas corpus* et dans le contexte d'actions civiles pour la protection de droits autres que la liberté individuelle.

4. La Cour jouit d'une pleine compétence pour l'interprétation et l'application du droit dans une affaire contentieuse, même quand l'exercice de cette compétence peut entraîner l'examen critique d'une décision d'un autre organe des Nations Unies. Elle ne représente pas directement les Etats Membres de l'Organisation (on l'a rappelé du haut de la tribune, et on a voulu en tirer comme conséquence l'incompétence de la Cour pour procéder à l'examen des résolutions du Conseil), mais c'est justement son imperméabilité à l'injonction politique qui fait de la Cour l'interprète par excellence du droit et le for naturel de la revision, au nom du droit, des actes des organes politiques, tel qu'il est de rigueur dans les régimes démocratiques. Ce serait bien une source d'étonnement si le Conseil de sécurité des Nations Unies devait jouir d'un pouvoir absolu et incontestable à l'égard de la règle de droit, privilège dont ne jouissent pas, en droit interne, les organes politiques de la plupart des fondateurs et des autres membres de l'Organisation, à commencer par les deux Etats défendeurs.

C'est aux Etats Membres des Nations Unies, au sein de l'Assemblée générale et du Conseil de sécurité, qu'appartient le pouvoir de légiférer, de changer s'ils le veulent les règles qui président au fonctionnement de l'Organisation. Dans l'exercice de la fonction législative, ils peuvent décider, par exemple, que l'Organisation peut se passer d'un organe judiciaire, ou que celui-ci, contrairement aux modèles nationaux, n'est pas l'interprète ultime de l'ordre juridique de l'Organisation, lorsque se pose la question de la validité d'une décision d'un autre organe du système. A ce que l'on sait, ils n'ont jamais songé à agir ainsi, et je pense que la Cour ne devrait pas être timide dans l'affirmation d'une prérogative qui lui revient de par la volonté présumée des Nations Unies.

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DISSENTING OPINION OF PRESIDENT SCHWEBEL

I regret that I am unable to agree with the Judgment of the Court. It is arguable that the challenge of the Respondent to the jurisdiction of the Court should not carry. But the reasons so tersely stated by the Court are conclusory rather than elucidatory, and, at most, are barely persuasive in a subsidiary respect. In my view, the Court's conclusions on the admissibility of Libya's Application, and as to whether it has become moot, are unpersuasive.

Jurisdiction

The question of whether the Court has jurisdiction over a dispute between the Parties under the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of International Civil Aviation depends on the resolution of antecedent questions. Does the Montreal Convention apply to the facts at issue in the current case? If it does, do the positions of the Parties in this case give rise to a dispute under the Convention?

The Preamble to the Convention declares its purpose to be that of "deterring" unlawful acts against the safety of civil aviation and providing appropriate measures for punishment of offenders. Article 10 provides that contracting States shall "endeavour to take all practicable measure for the purpose of preventing the offences mentioned in Article I". Article 12 provides that any contracting State having reason to believe one of the offences mentioned in Article 1 will be committed shall furnish relevant information to other States concerned. These provisions may be interpreted to imply that the Convention does not apply to allegations against persons accused of destroying an aircraft who are claimed, as in the instant case, to be acting as agents of a contracting State. Or, if that implication is too extended, those provisions of the Montreal Convention suggest that the Convention would hardly have deterrent effect if the State accused of having directed the sabotage were the only State competent to prosecute the persons accused of the act. At the same time, Article 1 of the Convention capaciously provides that, "Any person" commits an offence under the Convention if he performs an act thereafter listed. Moreover, Libya has not accepted that the accused were agents of its Government.

If it be assumed that the Convention does apply to persons allegedly State agents who are accused of destroying an aircraft, the question then arises whether there is a dispute between Libya and the Respondent *under the Convention*.

It is difficult to show, and in its Judgment the Court in my view does not show (as contrasted with concluding), that the Respondent can be in violation of provisions of the Montreal Convention, with the possible exception of Article 11, the Court does not show that there is a dispute between the Parties over such alleged violations. The Convention in the circumstances of the case imposes multiple obligations on Libya. None of the articles of the Convention invoked by Libya in the circumstances of this case imposes obligations on the Respondent (as the opinion of Sir Robert Jennings in the proceedings between Libya and the United Kingdom demonstrates). At most, it might be maintained that there is a dispute over breach of an obligation under Article 11, which provides in paragraph 1 that, "Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences. The law of the State requested shall apply in all cases." The Respondent, the State requested, has provided Libya with the indictment, but, in reliance upon the resolutions of the Security Council and its own law, has not, despite Libyan requests, done more. If in fact Libya has brought criminal proceedings against the accused, there is arguable ground for alleging the existence of a dispute under Article 11, though in truth the dispute is over the force of the Security Council's resolutions.

The Court principally relies, in upholding jurisdiction, on its unexplicated conclusion that, in view of the positions of the Parties, there exists between them a dispute regarding the interpretation and application of Article 7. Article 7 provides:

> "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed on its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."

The Respondent has not disputed Libya's obligation to prosecute the accused under Article 7 if Libya does not extradite them. It rather maintains that Libya is obliged by the supervening resolutions of the Security Council to surrender the accused for trial in the United States or the United Kingdom. Libya challenges this reading of the resolutions of the Security Council and contends that, if it is the right reading, the resolutions of the Security Council are unlawful and *ultra vires*. That is to say, there is no dispute between the Parties in this regard under

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Article 7 of the Montreal Convention. There is a dispute over the meaning, legality and effectiveness of the pertinent resolutions of the Security Council. The latter dispute may not be equated with the former. Consequently it does not fall within the jurisdiction of the Court under Article 14 of the Montreal Convention, which confines the Court's jurisdiction to "Any dispute between two or more Contracting States concerning the interpretation or application of this Convention . . ." Libya's complaint that the Security Council has acted unlawfully can hardly be a claim under the Montreal Convention falling within the jurisdiction of the Court pursuant to that Convention.

The Court holds that there is a further, overarching dispute between the Parties, because

> "The Parties differ on the question whether the destruction of the Pan Am aircraft over Lockerbie is governed by the Montreal Convention. A dispute thus exists between the Parties as to the legal régime applicable to this event. Such a dispute, in the view of the Court, concerns the interpretation and application of the Montreal Convention, and in accordance with Article 14, paragraph 1, of the Convention, falls to be decided by the Court."

That holding is not without formal force. But, as in this case, it lends itself to undue extension of the jurisdiction of the Court. If two States are parties to a treaty affording jurisdiction to the Court in disputes over its interpretation or application, is there a dispute under the treaty merely because one party so maintains — or maintains that the treaty constitutes the governing legal régime — while the other denies it?

It is in any event obvious that the Montreal Convention cannot afford the Court jurisdiction over Libya's submission that the Respondent

> "is under a legal obligation to respect Libya's right not to have the Convention set aside by means which would in any case be at variance with the principles of the United Nations Charter and with the mandatory rules of general international law prohibiting the use of force and the violation of the sovereignty, territorial integrity, sovereign equality and political independence of States" (Memorial of Libya, p. 255).

Disputes under the Montreal Convention do not import those arising under the Charter and customary international law. Yet the Court's holding on this submission is equivocal. While it states that it cannot uphold the Respondent's objection, at the same time it confines the Court's jurisdiction to actions alleged to be at variance with the provisions of the Montreal Convention.

Finally, in respect of jurisdiction, the Court observes that Security Council resolutions 748 (1992) and 883 (1993) were adopted after the filing of Libya's Application on 3 March 1992. It holds that, in accordance with its established jurisprudence, if the Court had jurisdiction on that date, it continues to do so; subsequent adoption of the Security Council's resolutions cannot affect its jurisdiction once established. That holding by its terms does not resolve whether, on 3 March 1992, the Court had jurisdiction. For the reasons set out above, the conclusion that it did is dubious.

Moreover, the cases on which the Court relies in so holding hardly seem to apply to the instant situation. The question at issue in the relevant phase of the *Nottebohm* case was whether, where jurisdiction had been established at the date of the application by Declarations under the Optional Clause, it could be disestablished by subsequent lapse of a Declaration by expiry or denunciation. Inevitably the Court held that it could not. In the case concerning *Right of Passage over Indian Territory*, the Court concordantly held that,

> "It is a rule of law generally accepted, as well as one acted upon in the past by the Court, that, once the Court has been validly seised of a dispute, unilateral action by the respondent State in terminating its Declaration . . . cannot divest the Court of jurisdiction." (Preliminary Objections, *Judgment, I.C.J. Reports 1957*, p. 142.)

Nothing of the kind at issue in either of those cases is pertinent to the instant case. There is no question of the Respondent unilaterally taking action that purports to denounce the Montreal Convention or to excise Article 14 thereof. Rather the Security Council has taken multilateral action in pursuance of its Charter powers by adopting resolution 748 which, as the Court held at the provisional measures stage of this case, both Libya and the Respondent, "as Members of the United Nations, are obliged to accept and carry out . . . in accordance with Article 25 of the Charter" (*I.C.J. Reports 1992*, pp. 15, 126). The Court then held that,

> "in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention" *(ibid.)*.

That is no less true in 1998 than it was in 1992.

In its Judgment on jurisdiction and admissibility of 11 July 1996 in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court held that, "It is the case that the jurisdiction of the Court must normally be assessed on the date of the filing of the act instituting proceedings." *(I.C.J. Reports 1996*, para. 26,

p. 613.) This most recent holding on the question imports that what is normal is not invariable; there is room for special treatment of the abnormal. The instant case, in which the Applicant challenges the legality and applicability to it of resolutions of the Security Council adopted to deal with what the Council held to be a threat to international peace, surely is one to be treated in the exceptional way to which the Court opened the door in 1996.

Admissibility and Mootness

The Respondent objects to the admissibility of Libya's claims in reliance upon Security Council resolutions 748 (1992) and 883 (1993), which, having been adopted under Chapter VII of the Charter, are binding and govern the Montreal Convention by virtue of Article 103 of the Charter. It maintained that the Court is not empowered to overturn the decisions of the Security Council and certainly is not authorized to overturn the Council's determination under Chapter VII of the existence of a threat to the peace and its choice of measures to deal with the threat. Libya, among other arguments, invoked the Court's holding in *Border and Transborder Armed Actions (Nicaragua v. Honduras)* that, "The critical date for determining the admissibility of an application is the date on which it is filed (cf. *South West Africa, Preliminary Objections, I.C.J. Reports 1962*, p. 344)." (*Jurisdiction and Admissibility, I.C.J. Reports 1988*, p. 95.)

In its Judgment, the Court upholds this submission of Libya, declaring that,

> "The date, 3 March 1992, on which Libya filed its Application, is in fact the only relevant date for determining the admissibility of the Application. Security Council resolutions 748 (1992) and 883 (1993) cannot be taken into consideration in this regard since they were adopted at a later date." (Para. 51.)

It is solely on this ground that the Court dismisses the Respondent's objection to the admissibility of the Application. It is solely on this ground that the Court finds it right, at this stage of the proceedings, to put aside resolutions of the Security Council adopted to deal with what the Council has found to be acts of international terrorism that constitute threats to international peace and security. ("Acts", rather than the atrocious act of destroying the aircraft of Pan American flight 103, not only because Libyan agents are alleged by French authorities to have destroyed Union de transports aériens flight 772 on 19 September 1989, another atrocity addressed by the Security Council in resolutions 731, 748 and 883. That allegation has led French juge d'instruction Jean-Louis Bruguière, after extensive investigation completed on 29 January 1998, to call for trial of six alleged Libyan secret service or former secret service agents, including a brother-in-law of Colonel Qaddafi (a trial which, under French law, can take place *in absentia*). (*Le Monde*, 31 January 1998, p. 11.) The Security Council also has chosen to act under Chapter VII of the Charter in view of its broader determination in resolution 748 "that the failure by the Libyan Government to demonstrate by concrete actions its renunciation of terrorism and in particular its continued failure to respond fully and effectively to the requests in resolution 731 (1992) constitute a threat to international peace and security".)

In my view, the holding of the Court is, on the facts of this case, even less persuasive in respect of admissibility than it is in respect of jurisdiction. It may be recalled that, in customary international law, the admissibility of a claim espoused by a State, under the rule of nationality of claims, is determined not as of the date of filing but as of the date of judgment. It may also be observed that the whole basis on which the Court in 1992 proceeded in approving its Order rejecting the provisional measures sought by Libya was that of the applicability, as of the date of its Order, of Security Council resolution 748, adopted after the date of the filing of Libya's Application and Libya's request for the indication of provisional measures.

There is little in the legal literature on the question of whether, in the jurisprudence of the Court, admissibility must be assessed as of the date of application, perhaps because the quoted holding of the Court in the case concerning *Border and Transborder Armed Actions (Nicaragua v. Honduras)* is the only such general holding of the Court. In the latest edition of his magisterial work, Shabtai Rosenne writes that the date of the filing of the act instituting the proceedings is the date "by reference to which the existence of the dispute and the admissibility of the case are normally determined . . ." (*The Law and Practice of the International Court, 1920-1996*, Vol. II, pp. 521-522). That appraisal leaves room for not necessarily determining admissibility as of the date of the application.

The Court's holding in the *Border and Transborder Armed Action* case referred to its prior holding in the *South West Africa* cases. In those cases, as well as in *Border and Transborder Armed Action*, the issue was not generally whether admissibility of an application is determined as of the date of the application but specifically whether an alleged impossibility of settling the dispute by negotiation could only refer to the time when the applications were filed. (*South West Africa Cases, Preliminary Objections, I.C.J. Reports 1962*, p. 344; *Border and Transborder Armed Actions (Nicaragua v. Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 95. See also to similar effect, *Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 148.) The utility of determining that question as of the date of the filing of the application is clear. But whether it follows that, generally and in all cases, the admissibility of an application is to be determined as of the date of its filing, is not so clear. It may indeed be asked whether the Court's apparently general holding in *Border and Transborder Armed Actions* is meant to have the comprehensive

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force which the Court assigns to it in this case, in view of the restricted concern of the Court in that and the other cases cited.

Moreover, the following lines of that Judgment significantly qualify the sweep of the first sentence of the paragraph It is instructive to quote the first sentence in the context of the following sentences:

> "The critical date for determining the admissibility of an application is the date on which it is filed (cf. *South West Africa, Preliminary Objections, I.C.J. Reports 1962*, p. 344). It may however be necessary, in order to determine with certainty what the situation was at the date of filing of the Application, to examine the events, and in particular the relations between the Parties, over a period prior to that date, and indeed during the subsequent period. Furthermore, subsequent events may render an application without object, or even take such a course as to preclude the filing of a later application in similar terms." (*I.C.J. Reports 1988*, p. 95, para. 66.)

In the case before the Court, it is precisely such "subsequent events", namely adoption by the Security Council of resolutions 748 and 883, that render Libya's Application "without object", that is to say, moot. Accordingly any judgment by the Court could have no lawful effect on the rights and obligations of the Parties in light of the Council's binding decisions and would thus not be within the proper judicial function of the Court.

In the case concerning the *Northern Cameroons*, the Court declared:

> "The function of the Court is to state the law, but it may pronounce judgment only in connection with concrete cases where there exists at the time of the adjudication an actual controversy involving a conflict of legal interests between the parties. The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations. No judgment on the merits in this case could satisfy these essentials of the judicial function." (*Northern Cameroons, Preliminary Objections, Judgment, I.C.J. Reports 1963*, pp. 33-34.)

The Court concluded:

> "The Court must discharge the duty to which it has already called attention — the duty to safeguard the judicial function. Whether or not at the moment the Application was filed there was jurisdiction in the Court to adjudicate upon the dispute submitted to it, circumstances that have since arisen render any adjudication devoid of purpose. Under these conditions, for the Court to proceed further in the case would not, in its opinion, be a proper discharge of its duties." (*Ibid.*, p. 38.)

In the two cases on *Nuclear Tests*, the Court held:

> "The Court, as a court of law, is called upon to resolve existing disputes between States. Thus the existence of a dispute is the primary condition for the Court to exercise its judicial function; it is not sufficient for one party to assert that there is a dispute, since 'whether there exists an international dispute is a matter for objective determination' by the Court . . . The dispute brought before it must therefore continue to exist at the time when the Court makes its decision. It must not fail to take cognizance of a situation in which the dispute has disappeared . . . all the necessary consequences must be drawn from this finding.
>
> Thus the Court concludes that, the dispute having disappeared, the claim advanced . . . no longer has any object. It follows that any further finding would have no raison d'être.
>
> ....
>
> The Court therefore sees no reason to allow the continuance of proceedings which it knows are bound to be fruitless.
>
> The object of the claim having clearly disappeared, there is nothing on which to give judgment." (*Nuclear Tests (Australia v. France), I.C.J. Reports 1974*, pp. 270-272. See also, *Nuclear Tests (New Zealand v. France), I.C.J. Reports 1974*, pp. 476-477.)

It follows that, in the case now before the Court, the Court should have held Libya's claims to be inadmissible, or at any rate moot, on the ground that the issues between it and the Respondent have been determined by decisions of the Security Council which bind the Parties and which, pursuant to Article 103 of the Charter, prevail over any rights and obligations that Libya and the Respondent have under the Montreal Convention. If the Court had done so, it would have removed a prolonged challenge to the exercise by the Security Council of its Charter responsibilities and presumably promoted Libya's compliance with its obligations, under Article 25 of the Charter, "to accept and carry out the decisions of the Security Council in accordance with the present Charter".

An exclusively preliminary character

However, the Court's Judgment holds that it may not so determine at this stage of the proceedings because of the terms of Article 79 of the Rules of Court. That article provides that its judgment on preliminary objections, whether they be to the jurisdiction or to the admissibility of the application, "or other objection the decision upon which is requested before any further proceedings on the merits", shall either uphold the objection, reject it, "or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character". The Court concludes that the objection that Libya's claims are without object constitutes in many respects the very subject-matter of any judgment on the merits and, hence, since it does not possess an exclusively preliminary character, must be remitted to the stage of the merits.

In my view, the Court's conclusion in this regard is substantial and, unlike some of its other conclusions, draws support from the reasoning and authority set out in the Judgment. But is the Court's conclusion, however plausible, compelling?

I do not find it so for these reasons. The Court takes an absolute view of an admittedly absolute term, "exclusively". It holds that the Respondent's objections are not exclusively preliminary in character. But it will be the rare preliminary objection that actually is exclusively preliminary in character. This will especially be so if the wide construction given by the Court in the current case to the meaning of "exclusively" is followed in future cases. The fact that a preliminary objection, if upheld, will dispose of the merits of the case in the sense of preventing a hearing of them proves nothing; all preliminary objections, if sustained, have this effect. More than this, Article 79 qualifies the conclusion that the objection does not possess an exclusively preliminary character by specifying that it "does not possess, in the circumstances of the case, an exclusively preliminary character". In the circumstances of this case, concerned as it is or should be with jurisdiction under the Montreal Convention — and there is no other ground for jurisdiction — a plea that the case should not proceed to a consideration of the merits of rights and obligations under the Montreal Convention because resolutions of the Security Council render such consideration without object must be treated as a plea of an exclusively preliminary character.

It may be added that, in the circumstances of this case, the Parties have extensively argued elements of the case which the Court now remits to the merits as part of the very subject-matter of the merits (as indeed the Parties did at the stage of provisional measures). Presumably they did so by dint of construction of paragraph 6 of Rule 79, which provides that,

> "In order to enable the Court to determine its jurisdiction at the preliminary stage of the proceedings, the Court, whenever necessary, may request the parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue."

They may also have had regard to the first paragraph of Article 79, which speaks of any other objection the decision upon which is requested before any "further" proceedings on the merits. The Court made no effort to limit the arguments of the Parties embracing elements of what it now treats as the merits. I do not think that the Court need now require, as it does require, the Parties to argue these elements once more — actually, for a third time — before it passes upon them and disposes of these objections. To have done so at this stage the Court needed neither the resolution of disputed facts nor the consideration of further evidence. To have ruled on the question of whether the resolutions of the Security Council render Libya's invocation of the Montreal Convention moot would not have entailed adjudicating the merits of the case in so far as it relates to what may be within the jurisdiction of the Court under the Montreal Convention. Important questions which may arise on the merits would in any event remain unaddressed, such as the propriety of the trial of the suspects in the United States or in the United Kingdom.

The Court's decision in effect to join the preliminary objections to the merits, a decision based essentially upon its literal construction of a word of a Rule of Court, does not appear consistent with the design of the Court in amending the Rules of Court in 1972. It has regrettable if unintended results, the least of which is requiring the Parties to argue, and the Court to hear, arguments on those objections, or some of those objections, for a third time. It will prolong a challenge to the integrity and authority of the Security Council. It may be taken as providing excuse for continued defiance of the Council's binding resolutions. It may be seen as prejudicing an important contemporary aspect of the Council's efforts to maintain international peace and security by combatting State-sponsored international terrorism. Justice for the victims of an appalling atrocity may be further delayed and denied. The Court may have opened itself, not only in this but in future cases, to appearing to offer to recalcitrant States a means to parry and frustrate decisions of the Security Council by way of appeal to the Court.

Judicial Review

That last spectre raises the question of whether the Court is empowered to exercise judicial review of the decisions of the Security Council, a question as to which I think it right to express my current views. The Court is

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not generally so empowered, and it is particularly without power to overrule or undercut decisions of the Security Council made by it in pursuance of its authority under Articles 39, 41 and 42 of the Charter to determine the existence of any threat to the peace, breach of the peace, or act of aggression and to decide upon responsive measures to be taken to maintain or restore international peace and security.

The Court more than once has disclaimed possessing a power of judicial review. In its Advisory Opinion in the case concerning *Certain Expenses of the United Nations (Article 17, paragraph 2, of the Charter)*, the Court declared:

> "In the legal systems of States, there is often some procedure for determining the validity of even a legislative or governmental act, but no analogous procedure is to be found in the structure of the United Nations. Proposals made during the drafting of the Charter to place the ultimate authority to interpret the Charter in the International Court of Justice were not accepted; the opinion which the Court is in course of rendering is an *advisory* opinion. As anticipated in 1945, therefore, each organ must, in the first place at least, determine its own jurisdiction. If the Security Council, for example, adopts a resolution purportedly for the maintenance of international peace and security and if, in accordance with a mandate or authorization in such resolution, the Secretary-General incurs financial obligations, these amounts must be presumed to constitute 'expenses of the Organization'." (*I.C.J. Reports 1962*, p. 168.)

In its Advisory Opinion on *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970)*, the Court reiterated that:

> "Undoubtedly, the Court does not possess powers of judicial review or appeal in respect of the decisions taken by the United Nations organs concerned." (*I.C.J. Reports 1971*, p. 45.)

It should be noted that the Court made these holdings in advisory proceedings, in which the Security Council and the General Assembly are entitled to request the Court's opinion "on any legal question". The authority of the Court to respond to such questions, and, in the course of so doing, to pass upon relevant resolutions of the Security Council and General Assembly, is not disputed. Nevertheless, if the Court could hold as it did in advisory proceedings, *a fortiori* in contentious proceedings the Court can hardly be entitled to invent, assert and apply powers of judicial review.

While the Court so far has not had occasion in contentious proceedings to pass upon an alleged authority to judicially review decisions of the Security Council, it may be recalled that, in *Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Jurisdiction and Admissibility, Judgment*, the Court observed that:

> "The Court is not asked to say that the Security Council was wrong in its decision, nor that there was anything inconsistent with law in the way in which the members of the Council employed their right to vote. The Court is asked to pass judgment on certain legal aspects of a situation which has also been considered by the Security Council, a procedure which is entirely consonant with its position as the principal judicial organ of the United Nations." (*I.C.J. Reports 1984*, p. 436.)

The implication of this statement is that, if the Court had been asked by the Applicant to say that the Security Council had been wrong in its decision, the Court would have reached another conclusion.

The texts of the Charter of the United Nations and of the Statute of the Court furnish no shred of support for a conclusion that the Court possesses a power of judicial review in general, or a power to supervene the decisions of the Security Council in particular. On the contrary, by the absence of any such provision, and by according the Security Council "primary responsibility for the maintenance of international peace and security", the Charter and the Statute import the contrary. So extraordinary a power as that of judicial review is not ordinarily to be implied and never has been on the international plane. If the Court were to generate such a power, the Security Council would no longer be primary in its assigned responsibilities, because if the Court could overrule, negate, modify — or, as in this case, hold as proposed that decisions of the Security Council are not "opposable" to the principal object State of those decisions and to the object of its sanctions — it would be the Court and not the Council that would exercise, or purport to exercise, the dispositive and hence primary authority.

The drafters of the Charter above all resolved to accord the Security Council alone extraordinary powers. They did so in order to further realization of the first Purpose of the United Nations,

> "To maintain international peace and security, and to that end: to take effective collective measures for the prevention and removal of threats to the peace, and for the suppression of acts of aggression or other breaches of the peace, and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace."

Article 24 thus provides:

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> "1. In order to ensure prompt and effective action by the United Nations, its Members confer on the Security Council primary responsibility for the maintenance of international peace and security, and agree that in carrying out its duties under this responsibility the Security Council acts on their behalf.
>
> 2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations . . ."

Article 25 provides that:

> "The Members of the United Nations agree to accept and carry out the decisions of the Security Council in accordance with the present Charter."

These provisions — the very heart of the Charter's design for the maintenance of international peace — manifest the plenitude of the powers of the Security Council, which are elaborated by the provisions of Chapters VI, VII, and VIII of the Charter. They also demonstrate that the Security Council is subject to the rule of law; it shall act in accordance with the Purposes and Principles of the United Nations and its decisions must be adopted in accordance with the Charter. At the same time, as Article 103 imports, it may lawfully decide upon measures which may in the interests of the maintenance or restoration of international peace and security derogate from the rights of a State under international law. The first Purpose of the United Nations quoted above also so indicates, for the reference to the principles of justice and international law designedly relates only to adjustment or settlement by peaceful means, and not to the taking of effective collective measures for the prevention and removal of threats to and breaches of the peace. It was deliberately so provided to ensure that the vital duty of preventing and removing threats to and breaches of the peace would not be limited by existing law. (See the Report on the Preamble, Purposes and Principles, *UNCIO*, Vol. 6, pp. 453-454, and the observations of Lord Halifax, p. 25.)

It does not follow from the facts that the decisions of the Security Council must be in accordance with the Charter, and that the International Court of Justice is the principal judicial organ of the United Nations, that the Court is empowered to ensure that the Council's decisions do accord with the Charter. To hold that it does so follow is a monumental *non sequitur*, which overlooks the truth that, in many legal systems, national and international, the subjection of the acts of an organ to law by no means entails subjection of the legality of its actions to judicial review. In many cases, the system relies not upon judicial review but on self-censorship by the organ concerned or by its members or on review by another political organ.

Judicial review could have been provided for at San Francisco, in full or lesser measure, directly or indirectly, but both directly and indirectly it was not in any measure contemplated or enacted. Not only was the Court not authorized to be the ultimate interpreter of the Charter, as the Court acknowledged in the case concerning *Certain Expenses of the United Nations*. Proposals which in restricted measure would have accorded the Court a degree of authority, by way of advisory proceedings, to pass upon the legality of proposed resolutions of the Security Council in the sphere of peaceful settlement — what came to be Chapter VI of the Charter — were not accepted. What was never proposed, considered, or, so far as the records reveal, even imagined, was that the International Court of Justice would be entrusted with, or would develop, a power of judicial review at large, or a power to supervene, modify, negate or confine the applicability of resolutions of the Security Council whether directly or in the guise of interpretation.

That this is understandable, indeed obvious, is the clearer in the light of the conjunction of political circumstances at the time that the Charter was conceived, drafted and adopted. The Charter was largely a concept and draft of the United States, and secondarily of the United Kingdom; the other most influential State concerned was the USSR. The United States was cautious about the endowments of the Court. Recalling the rejection by the Senate of the United States a decade earlier of adherence to the Statute of the Permanent Court of International Justice, the Department of State was concerned to assure that nothing in the Charter concerning the Court, and nothing in the Statute which was to be an integral part of the Charter, could prejudice the giving of advice and consent by the Senate to the ratification of the Charter. Thus the Report of the Senate Committee on Foreign Relations on the United Nations Charter of 16 July 1945 to the Senate recommending ratification of the Charter specified:

> "The Charter does not permit the Security Council or the General Assembly to force states to bring cases to the Court, nor does it or the Statute permit the Court to interfere with the functions of the Security Council or the General Assembly . . . Your committee recommends that the Senate accept the International Court of Justice in the form and with the authority set forth in chapter XIV of the Charter and the annexed Statute of the Court." (United States Senate, 79th Congress, Ist session, Executive Report No. 8, "The Charter of the United Nations", republished in United States Senate, 83rd Congress, 2nd session, Document No. 87, "Review of the United Nations Charter: A Collection of Documents", 1954, p. 67.)

The British Government which, together with the United States, was the principal proponent of the creation of the Permanent Court of International Justice and which had played a large and constructive part in respect of that Court, was hardly less cautious in its approach to the powers of the International Court of Justice, as is illustrated by a quotation from the proceedings of the San Francisco Conference set out below.

As for the Government of the Union of Soviet Socialist Republics — a Government which had been ideologically hostile to the Court since its creation (as a reading of the *Eastern Carelia* case so vividly illustrates) — can it be thought that Stalin, whose preoccupation in the days of San Francisco was giving the veto power the widest possible reach, could have assented to the establishment of a Court authorized to possess or develop the authority to review and vary the application of resolutions adopted by the Security Council under Chapter VII of the Charter?

At San Francisco, Belgium proposed the following amendment:

> "Any State, party to a dispute brought before the Security Council, shall have the right to ask the Permanent Court of International Justice whether a recommendation or a decision made by the Council or proposed in it infringes on its essential rights. If the Court considers that such rights have been disregarded or are threatened, it is for the Council either to reconsider the question or to refer the dispute to the Assembly for decision." (*UNCIO*, Vol. 3, p. 336.)

The purpose of the amendment, the Belgian delegate explained, was to allow the State concerned to seek an advisory opinion from the Court if that State believed that a Security Council recommendation infringed upon its essential rights. It was not in any sense the purpose of the amendment to limit the legitimate powers of the Security Council (*ibid.*, Vol. 12, pp. 48-49).

The Belgian proposal gave rise to a mixed reaction, support from States such as Ecuador and Colombia, and opposition from Great Power Sponsors of the Conference. The delegate of the Soviet Union

> "considered that the Belgian Amendment would have the effect of weakening the authority of the Council to maintain international peace and security. If it were possible for a state to appeal from the Council to the International Court of Justice . . . the Council would find itself handicapped in carrying out its functions. In such circumstances, the Council might even be placed in a position of being a defendant before the Court." (*Ibid.*, Vol. 12, p. 49.)

The delegate of the United States explained the importance of the requirement that the action of the Security Council in dealing with a dispute involving a threat to the peace be taken "in accordance with the purposes and principles of the Organization". One of the purposes is to bring about peaceful settlement of disputes "with due regard for principles of justice and international law". He did not interpret the Proposals as preventing any State from appealing to the International Court of Justice at any time on any matter which might properly go before the Court. On the whole, he did not consider the acceptance of the Belgian Amendment advisable, particularly since he believed that "the Security Council was bound to act in accordance with the principles of justice and international law" (*ibid.*). (It should be noted that this statement of 17 May 1945 antedated revision of the draft of the Charter's Purposes and Principles in June to provide that "the principles of justice and international law" relate only to the adjustment or settlement of international disputes by peaceful means and not to measures of collective security.)

The delegate of France declared that, while he viewed with great sympathy the ideas in the Belgian Amendment, he was doubtful that "it would be effective in obtaining its desired end, especially since it involved a dispersal of responsibilities in the Organization" (*ibid.*, p. 50).

The delegate of the United Kingdom stated that the adoption of the Belgian Amendment "would be prejudicial to the success of the Organization". The amendment would

> "result in the decision by the Court . . . of political questions in addition to legal questions. The performance of this function by the Court . . . would seriously impair the success of its role as a judicial body. Further, the procedures proposed by the amendment would cause delay, at a time when prompt action by the Security Council was most desirable. A powerful weapon would thus be placed in the hands of a state contemplating aggression, and the Council would not be able to play the part in maintaining peace which was intended for it . . . he considered it necessary that the Council possess the trust and confidence of all states; its majority would be composed of small states, and it would be obligated to act in a manner consistent with the purposes and principles of the Organization." (*Ibid.*, p. 65.)

After a few other statements in this vein, the delegate of Belgium stated that, since it was now clearly understood that a recommendation under what was to become Chapter VI did not possess obligatory effect, he wished to withdraw his amendment. (*Ibid.*, p. 66.)

Subsequently, the Conference rejected a proposal by Belgium to refer disagreements between organs of the United Nations on interpretation of the Charter to the Court. The pertinent report concludes:

> "Under unitary forms of national government the final determination of such a question may be

> vested in the highest court or in some other national authority. However, the nature of the Organization and of its operation would not seem to be such as to invite the inclusion in the Charter of any provision of this nature. If two member states are at variance concerning the correct interpretation of the Charter, they are of course free to submit the dispute to the International Court of Justice as in the case of any other treaty. Similarly, it would also be open to the General Assembly or to the Security Council, in appropriate circumstances, to ask the International Court of Justice for an advisory opinion concerning the meaning of a provision of the Charter." (*Ibid.*, Vol. 13, pp. 668-669.)

It may finally be recalled that, at San Francisco, it was resolved "to leave to the Council the entire decision, and also the entire responsibility for that decision, as to what constitutes a threat to peace, a breach of the peace, or an act of aggression" (*Ibid.*, Vol. 11, p. 17).

The conclusions to which the *travaux préparatoires* and text of the Charter lead are that the Court was not and was not meant to be invested with a power of judicial review of the legality or effects of decisions of the Security Council. Only the Security Council can determine what is a threat to or breach of the peace or act of aggression under Article 39, and under Article 39 only it can "decide what measures shall be taken . . . to maintain or restore international peace and security". Two States at variance in the interpretation of the Charter may submit a dispute to the Court, but that facility does not empower the Court to set aside or second-guess the determinations of the Security Council under Article 39. Contentious cases may come before the Court that call for its passing upon questions of law raised by Council decisions and for interpreting pertinent Council resolutions. But that power cannot be equated with an authority to review and confute the decisions of the Security Council.

It may of course be maintained that the Charter is a living instrument; that the present-day interpreters of the Charter are not bound by the intentions of its drafters of 50 years ago; that the Court has interpreted the powers of the United Nations constructively in other respects, and could take a constructive view of its own powers in respect of judicial review or some variation of it. The difficulty with this approach is that for the Court to engraft upon the Charter régime a power to review, and revise the reach of, resolutions of the Security Council would not be evolutionary but revolutionary. It would be not a development but a departure, and a great and grave departure. It would not be a development even arguably derived from the terms or structure of the Charter and Statute. It would not be a development arising out of customary international law, which has no principle of or provision for judicial review. It would not be a development drawn from the general principles of law. Judicial review, in varying forms, is found in a number of democratic polities, most famously that of the United States, where it was developed by the Supreme Court itself. But it is by no means a universal or even general principle of government or law. It is hardly found outside the democratic world and is not uniformly found in it. Where it exists internationally, as in the European Union, it is expressly provided for by treaty in specific terms. The United Nations is far from being a government, or an international organization comparable in its integration to the European Union, and it is not democratic.

The conclusion that the Court cannot judicially review or revise the resolutions of the Security Council is buttressed by the fact that only States may be parties in cases before the Court. The Security Council cannot be a party. For the Court to adjudge the legality of the Council's decisions in a proceeding brought by one State against another would be for the Court to adjudicate the Council's rights without giving the Council a hearing, which would run counter to fundamental judicial principles. It would run counter as well to the jurisprudence of the Court. (Cf. *East Timor (Portugal* v. *Australia), Judgment, I.C.J. Reports 1995*, pp. 100-105; *Monetary Gold Removed from Rome in 1943, Judgment, I.C.J. Reports 1954*, pp. 32-33.) Any such judgment could not bind the Council, because, by the terms of Article 59 of the Statute, the decision of the Court has no binding force except between the parties and in respect of that particular case.

At the same time, a judgment of the Court which held resolutions of the Security Council adopted under Chapter VII of the Charter not to bind or to be "opposable" to a State, despite the terms of Article 25 of the Charter, would seriously prejudice the effectiveness of the Council's resolutions and subvert the integrity of the Charter. Such a holding would be tantamount to a judgment that the resolutions of the Security Council were *ultra vires*, at any rate in relation to that State. That could set the stage for an extraordinary confrontation between the Court and the Security Council. It could give rise to the question, is a holding by the Court that the Council has acted *ultra vires* a holding which of itself is *ultra vires*?

For some 45 years, the world rightly criticized stalemate in the Security Council. With the end of the Cold War, the Security Council has taken great strides towards performing as it was empowered to perform. That in turn has given rise to the complaint by some Members of the United Nations that they lack influence over the Council's decision-making. However understandable that complaint may be, it cannot furnish the Court with the legal authority to supervene the resolutions of the Security Council. The argument that it does is a purely political argument; the complaints that give rise to it should be addressed to and by the United Nations in its consideration of the reform of the Security Council. It is not an argument that can be heard in a court of law.

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DISSENTING OPINION OF JUDGE ODA

1. I regret that I am unable to agree with any of the three points in the operative part of the Judgment as I see the whole case from a different viewpoint to that of the Court.

I.

LACK OF JURISDICTION — NO DISPUTE IN TERMS OF THE 1971 MONTREAL CONVENTION

2. The crux of the case before us is simple in that, to use the expression used by Libya in its Application, the United Kingdom "continues to adopt a posture of pressuring Libya into surrendering the accused" and "is rather intent on compelling the surrender of the accused".

The United Kingdom and Libya have adopted different positions concerning the surrender (transfer) of the two Libyans who are accused of the destruction of Pan Am flight 103 over Lockerbie and who are located in Libya. Those differing positions of the applicant State and the respondent State did *not*, however, constitute a "dispute . . . concerning the interpretation or application of the [1971 Montreal] Convention" to which both are parties (Montreal Convention, Art. 14, para. 1).

It is my firm belief that the Application by which, on 3 March 1992, Libya instituted proceedings against the United Kingdom pursuant to Article 14, paragraph 1, of the Montreal Convention should be dismissed on the sole ground that the dispute, if one exists, between the two States is not one that "concern[s] the interpretation or application of the [Montreal] Convention".

In order to clarify this conclusion, I find it necessary to examine the chain of events which have occurred since the United Kingdom outlined, on 13 November 1991, its position on the Lockerbie incident and which led to Libya filing its Application on 3 March 1992.

A. The United Kingdom and Libya's respective claims

3. The destruction of Pan Am Flight 103 occurred on 21 December 1988 over Lockerbie, Scotland, in the territory of the United Kingdom and involved the death of 11 residents of Lockerbie, 259 passengers and crew, including 189 United States' nationals and at least 29 United Kingdom nationals, and a number of citizens of another 19 States.

The United Kingdom's demand that Libya surrender the suspects

4. After carefully conducting a scientific investigation of the crash evidence for a period of over three years, the United Kingdom considered that it had identified the two persons responsible for the explosion — then located in Libya — who were said to have been acting as agents of the Libyan Government. The United Kingdom's position is set out in (i) the "Statement of facts by the Lord Advocate, Scotland, in the case of [the two suspects]" and (ii) the "Petition of the Procurator Fiscal of Court for the Public Interest unto the Honourable the Sheriff of South Strathclyde, Dumfries and Galloway at Dumfries", both dated 13 November 1991.

On the following day, 14 November 1991, the United Kingdom made public its charges against the two suspects through (i) the Announcement by the Lord Advocate of Scotland in which he stated that "I remain committed to bring this matter to a proper conclusion in a Court of Law whether it is to be in this country or in the United States" (U.N. doc. A/46/826; S/23307, Ann.) and (ii) the Statement of the then Foreign Secretary, the Rt. Hon. Douglas Hurd in the House of Commons, in which he said:

> "a demand is being made of the Libyan authorities for the surrender of the accused to stand trial. I repeat that demand on behalf of the whole Government.
>
> . . . .
>
> We expect Libya to respond fully to our demand for the surrender of the accused. The interests of justice require no less. This fiendish act of wickedness cannot be passed over or ignored." (See

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U.N. doc. A/46/826; S/23307, Ann. II.)

5. On 27 November 1991, the United Kingdom Government issued a statement that

> "the [British] Government demanded of Libya the surrender of the two accused for trial. We have so far received no satisfactory response from the Libyan authorities"

and in which it was further stated that:

> "The British and American Governments today declare that the Government of Libya must:
>
> — Surrender for trial all those charged with the crime; and accept complete responsibility for the actions of Libyan officials.
>
> — Disclose all it knows of this crime, including the names of all those responsible, and allow full access to all witnesses, documents and other material evidence, including all the remaining timers.
>
> — Pay appropriate compensation.
>
> We are conveying our demands to Libya through the Italians, as our protecting power. We expect Libya to comply promptly and in full." (See U.N. doc. A/46/826; S/23307, Ann. III.)

The second point seems to me to be contingent on the first point and the third point is nothing but a subsidiary request which was apparently not pursued by the United Kingdom.

6. On the same day, the United Kingdom and the United States, together with France (which had also been the victim of the destruction of an aircraft in flight, a UTA DC10, on 19 September 1989, in an attack allegedly carried out by Libyan agents), issued a tripartite declaration on terrorism. The declaration reads in part:

> "following the investigation carried out into the bombing[s] of Pan Am 103 . . . the three States have presented specific demands to the Libyan authorities related to the judicial procedures that are under way. They require that Libya comply with all these demands, and, in addition, that Libya commit itself concretely and definitively to cease all forms of terrorist action and all assistance to terrorist groups. Libya must promptly, by concrete actions, prove its renunciation of terrorism." (See U.N. doc. A/46/828; S/23309, Ann.)

The main thrust of the United Kingdom's claim was the demand for the surrender of the suspects. In demanding the surrender of the suspects, the United Kingdom took no further action other than issuing a statement or declaration in this respect which was conveyed to Libya through the Italian Government as the United Kingdom's protecting power.

Libya's response to the United Kingdom's demand

7. Libya responded to the accusation promptly on 15 November 1991 by means of Communiqué issued by the People's Committee for Foreign Liaison and International Cooperation (hereinafter "the Libyan People's Committee") in which it "categorically denie[d] that Libya had any association with that incident" and "reaffirm[ed] its condemnation of terrorism in all its forms". The Communiqué continued:

> "When a small, developing country such as Libya finds itself accused by super-Powers such as [the United States and] the United Kingdom, it reserves its full right to legitimate self-defence before a fair and impartial jurisdiction, before the United Nations and before the International Court of Justice and other bodies.
>
> . . . .
>
> We urge the United States and the United Kingdom to be governed by the logic of the law, by wisdom and by reason and to seek the judgement of impartial international commissions of inquiry or of the International Court of Justice." (See U.N. doc. S/23221, Ann.)

8. The Libyan People's Committee commented in its 28 November 1991 Communiqué on the statements issued by the three States that:

> "[a]ll the applications [of the three States] will receive every attention, inasmuch as the competent Libyan authorities will investigate it and deal with the matter very seriously, in a manner that accords with the principles of international legitimacy, including the rights of sovereignty and the importance

> of ensuring justice for accused and victims"

and that

> "Libya takes a positive view of international *détente* and the atmosphere which it spreads and which establishes international peace and security and leads to the emergence of a new international order in which all States are equal, the freedom and options of peoples are respected and the principles of human rights and the United Nations Charter and the principles of international law are affirmed." (See U.N. doc. A/46/845; S/23417, Ann.)

9. On 2 December 1991, the Libyan People's Committee issued a further declaration refuting the United Kingdom's accusation against Libya and reiterating its readiness to see that justice was done in connection with the Lockerbie incident.

10. These responses from Libya dated 15 November 1991, 28 November 1991 and 2 December 1991 (as referred to above), which all three dealt with more general issues relating to acts of terrorism, certainly implied a categorical refusal by that State to accede to the United Kingdom's demand to surrender the suspects.

The real issues existing between the United Kingdom and Libya

11. Since making the announcement, on 14 November 1991, of the indictment for a criminal act relating to the Lockerbie incident, the United Kingdom has accused Libya in the strongest terms of having links with international terrorism. Libya, on the other hand, contended that no Libyan agent was linked to the Lockerbie incident but stated its willingness to make every effort to eliminate international terrorism and to co-operate with the United Nations for this purpose.

Despite the mutual accusations that were made in relation to the respective positions of the two States on international terrorism, that issue, however, is *not* in dispute between the two States in the present case. Rather, Libya insisted on carrying out any criminal justice procedure on its own territory where the suspects were to be found and made clear that it had no intention of surrendering them to the United Kingdom, although it later expressed its readiness to hand the two suspects over to a third, neutral, State or to an international tribunal. Libya accused the United Kingdom of attempting to cause difficulties in demanding the surrender of the suspects.

12. In fact, what occurred between the United Kingdom and Libya was simply a demand by the United Kingdom for the surrender to it of the suspects located in Libya and a refusal by Libya to comply with that demand.

In demanding the surrender of the two suspects, the United Kingdom made an attempt to justify that demand as an appeal that criminal justice be pursued. The United Kingdom did not claim that Libya would be legally bound under any particular law to surrender the two suspects. In *none* of the documents that it issued did the United Kingdom make any mention of the Montreal Convention *nor* did it accept that that Convention applied to the incident, including the matter of the surrender of the suspects. *Nor* did Libya, until January 1992, invoke the Montreal Convention as the basis of its refusal to surrender the two suspects to the United Kingdom.

Libya invokes the Montreal Convention only on 18 January 1992

13. On 18 January 1992, the Secretary of the Libyan People's Committee addressed a letter to the United States Secretary of State and the Foreign Secretary of the United Kingdom through the Embassies of Belgium and Italy which were entrusted with looking after the interests of those two countries in Libya. After pointing out that the United States, the United Kingdom, and Libya were States parties to the 1971 Montreal Convention, Libya's letter stated:

> "out of respect for the principle of the ascendancy of the rule of law and in implementation of the Libyan Code of Criminal Procedure . . . as soon as the charges were made, Libya immediately exercised its jurisdiction over the two alleged offenders in accordance with its obligation under article 5, paragraph 2, of the Montreal Convention by adopting certain measures to ascertain their presence and taking immediate steps to institute a preliminary inquiry. It notified the States . . . that the suspects were in custody . . .
>
> As a State party to the Convention and in accordance with paragraph 2 of [article 5], we took such measures as might be necessary to establish our jurisdiction over any of the offences . . . because the alleged offender in the case was present in our territory.
>
> Moreover, article 7 of the Convention stipulates that the Contracting Party in the territory of which the alleged offender is found shall, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution and that those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State." (See U.N. doc. S/23441, Ann.)

14. It was in Libya's letter of 18 January 1992, as quoted above, that the 1971 Montreal Convention was first mentioned. The United Kingdom did not respond to that letter. The United Kingdom was then informed by the Registrar of the Court on 3 March 1992 of Libya's Application in which reference was again made to the Montreal Convention. It is important that this point should not be overlooked in deciding whether there did or did not exist, on the date of the Application (namely 3 March 1992), "any dispute . . . concerning the interpretation or application of the [Montreal] Convention which cannot be settled through negotiation" (Montreal Convention, Art. 14, para. 1).

B. The relevant issues of international law

The issues in the present case

15. There is no doubt that the 1971 Montreal Convention for the suppression of unlawful acts against the safety of civil aviation is, in general, applicable to the destruction of the American Pan Am aircraft which occurred in December 1988 over Lockerbie in the United Kingdom, as long as both Libya and the United Kingdom are parties to it.

Neither Party seems ever to have doubted that that destruction constituted a "crime" under the 1971 Convention. That point, however, is *not* in issue between the two States; *nor* is the prevention of international terrorism at issue in this case since proceedings were brought by Libya and *not* by the United Kingdom.

Furthermore, the question of whether the United Kingdom can hold Libya, as a State, responsible for the acts of Libyan nationals relating to the destruction of the American Pan Am aircraft over United Kingdom territory and of whether the explosion was caused by alleged Libyan intelligence agents (which would make Libya responsible for the acts committed by such persons), were *not* at issue either in the present Application which was instituted by Libya and *not* by the United Kingdom.

16. It would be wrong to consider that the present Application concerns the destruction of Pan Am flight 103 or, more generally, the Lockerbie incident as a whole which constituted an act of international terrorism. An application of that nature could have been filed by the United Kingdom but *not* by Libya.

The issues in the present case submitted by Libya to the Court relate solely to the demand of the Respondent, the United Kingdom, that the Applicant, Libya, surrender the two suspects identified by the Lord Advocate of Scotland as having caused the destruction of the Pan Am aircraft (clearly a crime pursuant to the Montreal Convention) and Libya's refusal to accede to the Respondent's demand. Relations between those two States regarding the case went no further than this.

Criminal jurisdiction

17. No State is prevented from exercising its criminal jurisdiction over a person or persons who have committed a crime on its territory, or a person or persons who have committed serious damage to its interest or against its nationals, or who have committed a crime of universal jurisdiction anywhere in the world. Accordingly, there is no doubt that in this case the United Kingdom is competent to exercise its criminal jurisdiction over the two suspects, whoever they may be and wherever they may be located.

Conversely, nor is there any doubt that any State is entitled to exercise its criminal jurisdiction over a serious crime committed by its nationals anywhere, either on its own territory or abroad. Libya's rights in this respect do not seem to have been challenged by the United Kingdom.

18. Thus, the right to prosecute or punish criminals does not fall within the exclusive jurisdiction of any particular State, either the State in which the crime has been committed (in this instance, the United Kingdom) or the State of which the criminal is a national (in this instance, Libya). The Libyan suspects in this case are subject to the concurrent jurisdictions of either the State where they have committed the crime or of the State where they are located. The Montreal Convention adds nothing to this general principle and does not deviate at all from it.

There is *no* difference in the views of the Applicant and the Respondent regarding the interpretation of those general rules of international law. There exists, apparently, *no* dispute in this respect.

19. The issues in this case arose *not* in relation to a legal question governing the rights and obligations of either Party to prosecute or punish the two suspects but are related rather to the fact that while the United Kingdom demanded that Libya transfer or surrender the two suspects located on its territory with a view to achieving criminal justice, Libya refused to accede to that demand, and, accordingly, the suspects have (so far) avoided the criminal jurisdiction of the United Kingdom.

Law of extradition

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20. States have not been under an obligation to extradite accused persons under general international law but some specific treaties, either multilateral or bilateral, have imposed the obligation on contracting States to extradite accused persons to other contracting States. The Montreal Convention is certainly one of those treaties.

An exception to that obligation to extradite criminals is made, however, in the event that the accused are of the nationality of the State which is requested to extradite them. This rule of non-extradition of nationals of the requested State may not seem to be quite appropriate for the purposes of criminal justice, as the accused may more adequately be prosecuted in the country where the actual crime occurred. While no rule of international law prohibits extradition of nationals of the requested State, there is a long-standing international practice which recognizes that there is no obligation to extradite one's own nationals. The Montreal Convention is no exception as it does not provide for the extradition of nationals of the requested State even for the punishment of these universally recognized unlawful acts.

The rule of non-extradition of political criminals has long prevailed but that rule does not apply in the case of some universal crimes, such as genocide and acts of terrorism.

21. The Montreal Convention, however, goes one step further in the event that States do not extradite the accused to other competent States, by imposing the duty upon the State where the accused is located to bring the case before its own competent authorities for prosecution. Under the Montreal Convention, Libya would thus assume the responsibility to prosecute the accused if it did not extradite them. Libya has not challenged this point at all. Libya has claimed that it was proceeding to the prosecution of the suspects and it has also expressed its willingness to extradite them to what it maintains are certain politically neutral States.

C. Conclusion

22. Thus conceived, the question relating to the United Kingdom's demand that Libya surrender the two suspects and Libya's refusal to accede to that demand is *not* a matter of rights or legal obligation concerning the extradition of accused persons between the United Kingdom and Libya under international law *nor* is it a matter falling within the provisions of the Montreal Convention. Or, at least, there is no *legal* dispute between Libya and the United Kingdom concerning the interpretation or application of the Montreal Convention which could have been brought to arbitration or to the Court.

If there is any difference between them on this matter, that could simply be a difference between their respective policies towards criminal justice in connection with the question of which State should properly do justice on the matter. That issue does *not* fall within the ambit of the Montreal Convention.

From the outset, *no* dispute has existed between Libya and the United Kingdom "concerning the interpretation or application of the [Montreal] Convention" as far as the demand for the surrender of the suspects and the refusal to accede to that demand — the main issue in the present case — are concerned. Libya *neither* presented any argument contrary to that viewpoint *nor* proved the existence of such a legal dispute.

*

23. I therefore conclude that *no* grounds exist on which the Court may exercise its jurisdiction to hear the present Application instituted by Libya.

II.

THE QUESTION OF ADMISSIBILITY — THE EFFECT OF THE SECURITY COUNCIL RESOLUTIONS

24. As I have stated above, I am firmly of the view that the Court lacks the jurisdiction to consider this Application filed by Libya. If the Court's jurisdiction is denied, as I believe it should be, the issue of whether the Application is or is not admissible does not arise. For me, at least, it is meaningless to discuss the question of admissibility.

However, the Court, after finding that it

> "has jurisdiction, on the basis of Article 14, paragraph 1, of the Montreal Convention . . . to hear the disputes between Libya and the United Kingdom as to the interpretation or application of the provisions of that Convention" (Judgment, operative part (1) *(b)*),

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continues to deal with the question of admissibility and finds that "the Application filed by Libya . . . is admissible" (*ibid.*, (2) *(b)*) by "reject[ing] the objection to admissibility derived by the United Kingdom from Security Council resolutions 748 (1992) and 883 (1993)" (*ibid.*, (2) *(a)*). Despite the fact that I am of the view that the question of admissibility should not arise since the Court should dismiss the Application on the ground of lack of jurisdiction, I would now like to comment upon the impact of these Security Council resolutions, which is the only issue dealt with in the present Judgment in connection with whether the Application is admissible or not.

25. Before doing so, I also have to refer to another point in the Judgment on which I disagree. The Judgment states that the Court

> "*declares* that the objection raised by the United Kingdom according to which Security Council resolutions 748 (1992) and 883 (1993) have rendered the claims of Libya without object does not, in the circumstances of the case, have an exclusively preliminary character." (Judgment, operative part (3).)

By finding the Application admissible, the Court certainly indicated that the objection of the United Kingdom that Libya's claims are without object as a result of the adoption of Security Council resolutions 748 and 883 does not have an exclusively preliminary character. In my view, however, this point should not form any separate or distinct issue from the question of admissibility but should be included in that question.

I believe that if the adoption of Security Council resolutions 748 and 883 is to be dealt with in connection with the question of admissibility of the Application, it should be dealt with at the present (preliminary) stage irrespective of whether this question possesses or not an *exclusively* preliminary character. I reiterate that the question of whether Libya's claims are without object because of the Security Council resolutions is a matter concerning admissibility which the Court should have dealt with at this stage.

A. Referral of the incident to the United Nations — particularly to the Security Council — by the Parties and their subsequent actions

26. It should be noted that the majority of the documents issued by the United Kingdom and Libya were communicated to the United Nations with the request that they be distributed as documents of both the General Assembly and the Security Council or of the Security Council alone (see paras. 4-7 above).

Referral of United Kingdom and Libyan documents to the United Nations

27. The United Kingdom only transmitted the relevant documents to the United Nations as late as 20 December 1991: (i) the announcement by the Lord Advocate of Scotland and the statement by the Foreign Secretary of the United Kingdom, both of 14 November 1991, and the statement issued by the British Government on 27 November 1991 were presented to the United Nations Secretary-General on 20 December 1991 and were distributed as documents A/46/826 and S/23307; (ii) the Joint Declaration of 27 November 1991 was also transmitted to the United Nations Secretary-General on 20 December 1991 and distributed as documents A/46/828 and S/23309.

28. It was, however, *Libya* that had already informed the United Nations Secretary-General of the British statements in which the accusation that the two suspects were involved in the Lockerbie incident was made. This occurred well before the United Kingdom transmitted its documents to the United Nations.

Three documents were transmitted by Libya to the United Nations: (i) Libya's first Communiqué was transmitted on 15 November 1991 to the President of the Security Council and was distributed as document S/23221; (ii) Libya's Communiqué responding to the three States' (the United Kingdom, the United States, and France) Joint Declaration of 27 November 1991 was transmitted on 28 November 1991, and was distributed as documents A/46/845 and S/23417; and (iii) a letter dated 18 January 1992 from the Secretary of the Libyan People's Committee addressed to the United States Secretary of State and to the Foreign Secretary of the United Kingdom was transmitted on that same day to the President of the Security Council and was distributed as document S/23441.

Libya's notification of the events to the United Nations

29. The relevant documents were thus transmitted by Libya for distribution to the delegates in the General Assembly and particularly to the members of the Security Council. In addition, a few days after the United Kingdom and the United States announced the indictment of the two Libyan suspects, the Secretary of the Libyan People's Committee sent letters addressed directly to the United Nations Secretary-General (as indicated in para. 30 below) in an effort to draw the attention of the United Nations member States to the chain of events that had unfolded since 13 November 1991, particularly in relation to the transfer of the suspects. Libya seems to have believed that the matters involved were not legal issues but were concerned with international peace and security.

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and, as such, were to be dealt with by the United Nations.

30. In (i) its letter to the Security Council of 17 November 1991, issued as United Nations document A/46/660 and S/23226, Libya requested a dialogue between itself, on the one hand, and the United Kingdom and the United States, on the other, and expressed its readiness to cooperate in the conduct of any neutral and honest enquiry. Libya affirmed its belief in the peaceful settlement of disputes, as provided for in Article 33, paragraph 1, of the Charter, which lays down that the parties to any dispute "shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement ..."; (ii) in its letter of 20 November 1991, issued as United Nations document A/46/844 and S/23416, Libya stated its "unconditional readiness to cooperate in order to establish the truth" and declared its "readiness to cooperate to the full with any impartial international judicial authority". This letter emphasized that the Charter "guarantees the equality of peoples and their right to make their own political and social choices, a right that is enshrined in religious laws and is guaranteed by international law"; (iii) in its letter of 8 January 1992, issued as United Nations document A/46/841 and S/23396, Libya stated:

> "If it is a matter of political differences between the three countries and Libya, then the differences must be discussed on the basis of the Charter of the United Nations, which does not endorse aggression or the threat of aggression but rather calls for the resolution of differences by peaceful means. Libya has expressed its readiness to pursue any peaceful means that the three countries may desire for the resolution of existing differences."

31. It is thus clear that the announcement of the Lord Advocate of Scotland and the United Kingdom's demand for surrender of the two suspects, and Libya's immediate refusal to accede to that demand, had already been notified by Libya to the United Nations on 17 November 1991 — not apparently as legal issues existing solely between the two States but as matters concerning international peace and security in which the United Nations should be involved.

B. The Security Council resolutions

Security Council resolution 731 (1992) of 21 January 1992

32. On 20 January 1992 — that is to say two days after the Libyan letter of 18 January 1992 addressed to the United States and to the United Kingdom was distributed as a Security Council document S/23441 (as stated above in para. 28) — the United Kingdom and the United States, together with France, presented a draft resolution for adoption to the Security Council (U.N. doc. S/23762), the main purpose of which was to encourage Libya to provide "a full and effective response to the *request*" (emphasis added) made by the United Kingdom and the United States.

It should be noted that, in fact, the surrender of the two suspects to the United Kingdom (or to the United States) was not mentioned explicitly in this draft resolution except by a simple reference to the letters reproduced in Security Council documents S/23306, S/23307, S/23308, S/23309 and S/23317 (the letters addressed to the United Nations by the United Kingdom and the United States; S/23306 was sent to the Security Council by France).

33. On the following day, 21 January 1992, the Security Council was convened and the agenda — *letters dated 20 and 23 December 1991 (S/23306; S/23307; S/23308; S/23309; and S/23317)*: the letters indicated in the agenda consisted of the letters addressed to the United Nations Secretary-General by France, the United Kingdom, and the United States, mentioned above — was adopted.

34. Most of the arguments presented were directed at rather general questions relating to the condemnation or elimination of international terrorism, on the tacit understanding that the destruction of Pan Am flight 103 was caused by persons (allegedly Libyan intelligence agents) now residing in Libya.

The surrender of the two suspects by Libya to either the United Kingdom or the United States was barely addressed in the Security Council debates. Support for the surrender of the two suspects was mentioned in the debates in only the statements of the United Kingdom and of the United States. The United States' representative said:

> "The resolution makes it clear that the Council is seeking to ensure that those accused be tried promptly in accordance with the tenets of international law. The resolution provides that the people accused be simply and directly turned over to the judicial authorities of the Governments which are competent under international law to try them." (U.N. doc. S/PV.3033, p. 79.)

The United Kingdom's representative said:

> "We very much hope that Libya will respond fully, positively and promptly, and that the accused will be made available to the legal authorities in Scotland or the United States . . . The two accused of

> bombing Pan Am flight 103 must face, and must receive a proper trial. Since the crime occurred in Scotland and the aircraft was American, and since the investigation has been carried out in Scotland and in the United States, the trial should clearly take place in Scotland or in the United States. It has been suggested the men might be tried in Libya. But in the particular circumstances there can be no confidence in the impartiality of the Libyan courts." (*Ibid.*, p. 105.)

35. In the meeting that took place on 21 January 1992, the Security Council unanimously adopted resolution 731 (1992) which includes the following:

> "*The Security Council*,
>
> . . . .
>
> *Deeply concerned* over the results of investigations . . . which are contained in Security Council documents that include the *requests* addressed to the Libyan authorities by . . . the United Kingdom . . . and the United States . . . in connection with the legal procedures related to the attack[s] carried out against Pan American flight 103 . . .;
>
> *Determined* to eliminate international terrorism,
>
> . . . .
>
> 2. *Strongly deplores* the fact that the Libyan Government has not yet responded effectively to the above *requests* to cooperate fully in establishing responsibility for the terrorist act[s] . . . against Pan American flight 103 . . .;
>
> 3. *Urges* the Libyan Government immediately to provide a full and effective response to *those requests* so as to contribute to the elimination of international terrorism;
>
> 4. *Requests* the Secretary-General to seek the cooperation of the Libyan Government to provide a full and effective response to *those requests*" (Emphasis added).

It should be noted that, although the surrender of the two suspects was not specifically mentioned in the resolution, the "request" referred to therein meant mainly the surrender of the suspects, and that the Security Council referred to the *request* of the United Kingdom and of the United States that Libya co-operate in establishing responsibility for the terrorist act, which *request*, as I repeat, included a call for the surrender of the two suspects.

36. The Secretary-General presented a report on 11 February 1992, issued as United Nations document S/23574, pursuant to paragraph 4 of Security Council resolution 731 in which the Secretary-General gave a report on the visit of his mission to Libya and transmitted Libya's viewpoint. On 3 March 1992, the Secretary-General presented a further report on the same issue as United Nations document S/23672 which concluded that:

> "it will be seen that while resolution 731 (1992) has not yet been complied with, there has been a certain evolution in the position of the Libyan authorities since the Secretary-General's earlier report of 11 February 1992."

It was on that very date, 3 March 1992, that Libya filed the Application in the present case instituting proceedings against the United Kingdom on "questions of interpretation and application of the [1971] Montreal Convention arising from the aerial incident at Lockerbie".

The meaning of Security Council resolution 731 (1992)

37. It appears from this chain of events dating from November 1991 to the date of the Application, namely 3 March 1992, that what concerned Libya was the fact that, on the basis of a proposal made by the United Kingdom and the United States, as well as France, the Security Council had passed resolution 731 on 21 January 1992 by which it "urge[d] the Libyan Government immediately to provide a full and effective response to *those requests* so as to contribute to the elimination of international terrorism" (emphasis added) ("those requests" being mainly the requests of the United Kingdom and the United States for surrender of the suspects).

The United Kingdom and the United States did *not* at that time appear to have considered that there was a "dispute" between themselves and Libya within the meaning of Chapter VI of the United Nations Charter, as is clear from the fact that the United Kingdom and the United States participated in the voting on that Security Council resolution 731. Libya appears to have considered that the United Kingdom and the United States would have been well aware that their demand, now called a "request", would have had to be made simply from the standpoint of a political consideration that international terrorism should be condemned and eliminated.

38. The United Kingdom and the United States were apparently of the view, on 20-21 January 1992, that Libya's

refusal to surrender the two suspects named in connection with the Lockerbie incident would have consequences for the maintenance of international peace and security, and should have been dealt with by the Security Council which has primary responsibility for that object. It may be assumed that the United Kingdom and the United States would have known that the demand would not be a matter that could be dealt with from a legal point of view.

The fact that, on 21 January 1992, the Security Council dealt unanimously with the Lockerbie incident as a matter connected with international peace and security had nothing to do with the issue of whether or not the United Kingdom and the United States had legal competence to require the surrender of the two suspects and of whether or not Libya was obliged to surrender them under the provisions of the Montreal Convention. These separate issues should be examined on their own merits.

Security Council resolutions 748 (1992) and 883 (1993)

39. The United Kingdom and the United States appear, after the filing of Libya's Application in the present case, to have considered that Libya's firm resistance to the surrender of the two suspects would constitute "threats to the peace, breaches of the peace, and acts of aggression" (United Nations Charter, Chap. VII). In fact, the United Kingdom and the United States, together with France, submitted another draft resolution to the Security Council on 30 March 1992 (document S/25058). This appeal by the United Kingdom and the United States (as well as France) to the Security Council to adopt a draft resolution under Chapter VII of the United Nations Charter was not directly related to the present Application filed by Libya on 3 March 1992 and had been under negotiation in the Security Council before that date.

40. On 31 March 1992, the Security Council, "acting under Chapter VII of the Charter", adopted resolution 748 (1992). The United Kingdom and the United States, as sponsoring States, ensured that the proposal before the Security Council stated that it was "deeply concerned that the Libyan Government has still not provided a full and effective response to the *requests* in its resolution 731" (emphasis added).

During the meeting in the Security Council, the United States' representative said:

> "We have called upon Libya to . . . turn over the two suspects in the bombing of Pan Am 103 for trial in either the United States or the United Kingdom . . . This resolution also makes clear the Council's decision that Libya should comply with those demands." (U.N. doc. S/PV.3063, p. 66.)

The United Kingdom representative stated:

> "We were especially grateful to the Arab Ministers who went to Tripoli last week to seek to persuade the Libyan leader to comply and hand over the accused so that they could stand trial. The three co-sponsors of the resolution have taken the greatest care to allow time for these efforts to bear fruit." (*Ibid.*, p. 69.)

In fact the demand for the surrender of the suspects was inserted implicity into that resolution, although its main purpose was to condemn the Lockerbie incident itself totally and also, more generally, acts of terrorism in which Libya was allegedly involved. The Security Council decided to impose economic sanctions upon Libya.

41. Having obtained no positive result from Security Council resolution 748, the United Kingdom and the United States (together with France) again took the initiative in proposing a renewed resolution to the Security Council (U.N. doc. S/26701) which, on 11 November 1993, adopted Security Council resolution 883 (1993), along similar lines to resolution 748 (1992). In that meeting the United States' representative said "[w]e await the turnover of those indicted for the bombing of Pan Am 103", (U.N. doc. S/PV.3312, p. 41), and the United Kingdom's representative stated:

> "if the Secretary-General reports to the Council that the Libyan Government has ensured the appearance of those charged with the Lockerbie bombing before the appropriate United States or Scottish court . . . then the Security Council will review the sanctions with a view to suspending them immediately." (*ibid.*, p. 45.)

C. Conclusion

42. The question remains whether these Security Council resolutions, particularly resolutions 748 (1992) and 883 (1993), which were adopted after the filing of the Application in this case, have any relevance to the present case brought by Libya. In other words, the question of whether Libya's 3 March 1992 Application has become without object after the adoption of these 31 March 1992 and 11 November 1993 Security Council resolutions, is totally irrelevant to the case presented by Libya. If there is any dispute in this respect, it could be a dispute between Libya and the Security Council or between Libya and the United Nations, or both, but *not* between Libya and the United Kingdom.

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The effect of the Security Council resolutions (adopted for the aim of maintaining international peace and security) upon member States is a matter quite irrelevant to this case and the question of whether Libya's Application is without object in the light of those resolutions hardly arises.

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43. Even though I found that Libya's Application should be dismissed owing to the Court's lack of jurisdiction, I nonetheless wanted to express my view that these Security Council resolutions, which have a political connotation in dealing with broader aspects of threats to the peace or breaches of the peace, have nothing to do with the present case, which could have been submitted to the Court as a legal issue which existed between the United Kingdom and Libya, and between the United States and Libya, before the resolutions were adopted by the Security Council.

DÉCLARATION COMMUNE DE MM. BEDJAOUI, GUILLAUME ET RANJEVA

Paragraphe 5 de l'article 31 du Statut — Cause commune entre le Royaume-Uni et les Etats-Unis — Royaume-Uni n'étant pas en droit de désigner un juge ad hoc.

1. La question s'est posée dans la présente affaire de savoir si le Royaume-Uni était ou non en droit de désigner un juge *ad hoc* dans la présente phase de la procédure relative à la compétence de la Cour et à la recevabilité de la requête libyenne. La Cour a répondu à cette question par l'affirmative. Elle n'a cependant pas cru devoir motiver sa décision qu'elle s'est bornée à rappeler au paragraphe 9 de son arrêt. Cette décision inexpliquée nous paraît inexplicable et nous estimons par suite de notre devoir de préciser ici pourquoi nous n'avons pu y souscrire.

LE PROBLEME POSE ET LA SOLUTION ADOPTEE PAR LA COUR

2. Parmi les membres de la Cour figurent à l'heure actuelle M. Stephen Schwebel, président de la Cour, qui possède la nationalité américaine et Mme Rosalyn Higgins de nationalité britannique. Conformément au paragraphe 5 de l'article 31 du Statut de la Cour, l'un et l'autre avaient le droit de siéger dans les deux affaires opposant d'une part la Libye et les Etats-Unis, d'autre part la Libye et le Royaume-Uni.

L'article 32 du Règlement de la Cour précise cependant que «[s]i le président de la Cour est ressortissant de l'une des parties dans une affaire, il n'exerce pas la présidence pour cette affaire». Le président Schwebel était ainsi tenu de laisser la présidence de la Cour au vice-président dans l'affaire opposant la Libye aux Etats-Unis. Compte tenu des circonstances, il a en outre décidé d'abandonner également la présidence dans l'affaire opposant la Libye au Royaume-Uni. Cette décision reflétait celle, identique, qu'avait prise sir Robert Jennings, alors président de la Cour dans des circonstances comparables lors de l'examen des mesures conservatoires sollicitées par la Libye en 1992 [*Ordonnance du 14 avril 1992, C.I.J. Recueil 1992*, p. 3 et 114].

Par ailleurs Mme Rosalyn Higgins fit connaître à la Cour qu'«ayant été conseil du Royaume-Uni au cours des toutes premières phases» de l'affaire opposant la Libye et le Royaume-Uni, elle ne pourrait prendre part à la procédure dans cette affaire. Compte tenu des circonstances dans lesquelles les mémoires des Parties avaient été préparés, Mme Higgins estima en outre devoir se déporter dans l'affaire opposant la Libye et les Etats-Unis.

Cette décision, comme celle du président Schwebel, traduisait des scrupules auxquels il convient de rendre hommage. Elle n'en allait pas moins soulever des problèmes de procédure délicats.

3. Le 5 mars 1997, le Royaume-Uni fit en effet connaître à la Cour qu'il avait été informé de la décision de Mme Higgins et «que conformément à l'article 31 du Statut de la Cour et à l'article 37 de son Règlement», il avait «désigné sir Robert Jennings, Kt., Q.C., ancien président de la Cour, pour siéger en qualité de juge *ad hoc* aux fins de la prochaine procédure orale» dans l'affaire opposant la Libye et le Royaume-Uni.

4. La désignation ainsi faite paraissait à première vue conforme au paragraphe 3 de l'article 31 du Statut de la Cour selon lequel «[s]i la Cour ne compte sur le siège aucun juge de la nationalité des parties, chacune de ces parties peut procéder à la désignation» d'un juge *ad hoc*.

Elle n'en soulevait pas moins une difficulté au regard du paragraphe 5 du même article. Celui-ci précise en effet que :

> «Lorsque plusieurs parties font cause commune, elles ne comptent, pour l'application des dispositions qui précèdent, que pour une seule. En cas de

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doute, la Cour décide.»

5. Les articles 36 et 37 du Règlement de la Cour déterminent les conditions d'application de l'article 31 du Statut. Le paragraphe 1 de l'article 37 dispose que :

> «Si un membre de la Cour ayant la nationalité de l'une des parties n'est pas ou n'est plus en mesure de siéger dans une phase d'une affaire, cette partie est autorisée à désigner un juge *ad hoc* dans un délai fixé par la Cour ou, si elle ne siège pas, par le président.»
>
> Puis le paragraphe 2 ajoute que :
>
> «Les parties faisant cause commune ne sont pas considérées comme comptant sur le siège un juge de la nationalité de l'une d'elles si le membre de la Cour ayant la nationalité de l'une d'elles n'est pas ou n'est plus en mesure de siéger dans une phase d'une affaire.»

6. La question se posait donc en l'espèce de savoir si le Royaume-Uni et les Etats-Unis, devaient être regardés comme «faisant cause commune» au moins dans la présente phase de la procédure, face à la Libye. Dans la négative, le Royaume-Uni était en droit de désigner un juge *ad hoc* dans l'affaire l'opposant à la Libye (mais non dans celle concernant les Etats-Unis). Dans l'affirmative, le Royaume-Uni ne pouvait désigner de juge *ad hoc*, la Cour comptant déjà sur le siège dans les deux affaires un juge *ad hoc* choisi par la Libye et un juge ayant la nationalité des Etats-Unis, pays faisant cause commune avec le Royaume-Uni.

7. La Cour semble avoir hésité longuement sur la solution à retenir. Dans une première phase, le Greffe a, selon l'usage, communiqué la lettre du Royaume-Uni à l'agent de la Libye qui fut invité à présenter toutes observations utiles avant le 7 avril 1997. La Cour ne reçut aucun commentaire de la Libye dans le délai prescrit.

La Cour donna alors instruction au Greffe d'informer les trois Etats concernés qu'elle était en outre disposée à recevoir d'eux, pour le 30 juin au plus tard, toutes observations qu'ils pourraient souhaiter formuler au regard du paragraphe 5 de l'article 31 du Statut. Le Royaume-Uni déposa un mémoire exposant les raisons pour lesquelles, à son avis, il n'y avait pas en l'espèce cause commune. Les Etats-Unis se prononcèrent dans le même sens. Dans une lettre fort brève, la Libye prit parti en sens inverse. Le 16 septembre 1997, la Cour fit part de sa décision aux Parties. Ainsi plus de six mois s'étaient écoulés entre la désignation opérée par le Royaume-Uni et la décision de la Cour.

LA JURISPRUDENCE SUR LA CAUSE COMMUNE

8. Cette décision paraît à première vue contraire à la jurisprudence de la Cour permanente de Justice internationale comme à celle de la Cour internationale de Justice concernant la cause commune qu'il convient d'analyser avant d'en venir aux faits de l'espèce.

9. Cette jurisprudence s'est dégagée dès les origines de la Cour permanente.

Dans l'affaire relative à la *Juridiction territoriale de la Commission internationale de l'Oder*, les Gouvernements allemand, britannique, français, suédois et tchécoslovaque qui faisaient cause commune avec le Danemark contre la Pologne ne comptaient pas sur le siège de juge de leur nationalité. Ils ne furent cependant pas amenés à en désigner un, un juge danois étant appelé à siéger face au juge polonais [Arrêt no 16 du 10 septembre 1929, *C.P.J.I. série A no 23, p.* 5].

Dans l'affaire consultative du *Régime douanier entre l'Allemagne et l'Autriche*, la Cour, après avoir entendu les parties préalablement à tout débat au fond, constata que les Gouvernements allemand et autrichien, d'une part, les Gouvernements français, italien et tchécoslovaque, d'autre part, faisaient cause commune. La Cour releva par ailleurs qu'elle comptait sur le siège des juges de nationalité allemande, française et italienne. Elle en déduisit «qu'il n'y a pas lieu, dans la présente affaire, à la désignation de juges *ad hoc*, soit par l'Autriche, soit par la Tchécoslovaquie».

C'est à cette occasion que la Cour permanente a, pour la première fois, dégagé le critère permettant de déterminer si des Etats font cause commune. L'hésitation était permise sur ce point dans la mesure où le texte anglais du Statut visait les «*Parties in the same interest*», tandis que la version française concernait les parties qui «font cause commune». A l'évidence, le texte anglais était plus large et aurait permis d'exclure la désignation de juges *ad hoc* dans de plus nombreux cas. La Cour permanente s'en tint cependant au texte français et estima que la disposition en cause ne pouvait s'appliquer que si les Etats concernés étaient dans une situation du «*litis consortium*»[Voir *Statut et Règlement de la Cour permanente de Justice internationale - Eléments d'interprétation*, Carl Heymanns Verlag, Berlin, 1934, p. 190. Voir aussi Hudson, *La Cour permanente de Justice internationale*, p. 391, note 73.]. En effet dans son ordonnance du 20 juillet 1931, elle releva que «tous les gouvernements qui, devant la Cour, arrivent à la même conclusion, doivent être considérés comme faisant cause commune aux fins de la présente procédure»[Ordonnance du 20 juillet 1931, *C.P.J.I. série A/B n^o 41*, p. 89.]. Puis elle constata que «les thèses soutenues par les Gouvernements allemand et autrichien aboutissent à une même conclusion» alors que les thèses des trois autres gouvernements «aboutissent à la conclusion opposée»[*Ibid.*, p. 90.]. Elle en déduisit que de part et d'autre les gouvernements en question faisaient cause commune.

10. La Cour internationale de Justice, pour sa part, eut à connaître de ce problème pour la première fois dans les affaires du *Sud-Ouest Africain* sur les requêtes présentées respectivement par l'Ethiopie et le Libéria contre l'Afrique du Sud. Aucun de ces Etats ne comptait sur le siège de juge de sa nationalité et chacun d'eux avait, avant le dépôt des mémoires, manifesté son intention de désigner un juge *ad hoc*. L'Afrique du Sud avait fait de même.

La Cour attendit le dépôt des mémoires, puis se prononça par ordonnance du 20 mai 1961. Dans les motifs de cette ordonnance, la Cour reprit en premier lieu à son compte la jurisprudence de la Cour permanente en précisant que «tous les gouvernements qui, devant la Cour, arrivent à la même conclusion, doivent être considérés comme faisant cause commune». Ce faisant, elle posait un principe général sans limiter à l'espèce la solution retenue.

Puis la Cour constata que les conclusions contenues dans les requêtes et les mémoires étaient *mutatis mutandis* identiques et que «les textes mêmes» de ces requêtes et mémoires «sont, sauf sur quelques points mineurs, identiques». Elle en déduisit que le Libéria et l'Ethiopie font «cause commune» devant la Cour «et ne comptent, par conséquent, en ce qui concerne la désignation d'un juge *ad hoc*, que pour une seule partie» [*Sud-Ouest africain, ordonnance du 20 mai 1961, C.I.J. Recueil 1961*, p. 14.].

Au vu de ces divers considérants, la Cour joignit les deux instances, dit que les deux Gouvernements de l'Ethiopie et du Libéria font cause commune et leur fixa un délai d'un peu moins de six mois pour désigner, d'un commun accord, un juge *ad hoc*. L'Afrique du Sud avait de son côté désigné un tel juge et l'équilibre était ainsi assuré entre demandeurs et défendeur.

11. La question se posa en termes un peu différents dans l'affaire du *Plateau continental de la mer du Nord*. Dans cette affaire, la République fédérale d'Allemagne avait signé deux compromis distincts, l'un avec le Danemark, l'autre avec les Pays-Bas. Les trois gouvernements avaient en outre conclu entre eux le même jour un protocole par lequel ils convenaient de demander à la Cour de joindre les deux instances et ajoutaient :

> «Les trois gouvernements conviennent qu'aux fins de la désignation d'un juge *ad hoc*, les Gouvernements du Royaume du Danemark et du Royaume des Pays-Bas seront considérés comme faisant cause commune au sens de l'article 31, paragraphe 5, du Statut de la Cour.» [*Plateau continental de la mer du Nord, ordonnance du 26 avril 1968, C.I.J. Recueil 1968*, p. 10.]

Dans le délai fixé pour le dépôt des contre-mémoires, le Danemark et les Pays-Bas firent connaître à la Cour, par lettres séparées, que chacun d'eux avait choisi M. Sørensen comme juge *ad hoc*. La Cour, après dépôt des contre-mémoires, mais avant que les parties aient sollicité la jonction d'instance conformément au protocole, se prononça par ordonnance du 28 avril 1968. Elle rappela dans cette ordonnance les conditions dans lesquelles le Danemark et les Pays-Bas avaient désigné un juge *ad hoc*, ainsi que les dispositions agrées par les parties à cet égard. Mais elle exprima en outre son souci de vérifier elle-même dans les écritures si les deux gouvernements faisaient effectivement cause commune, et constata «que les contre-mémoires déposés par les Gouvernements du Danemark et des Pays-Bas confirment que les deux gouvernements considèrent qu'ils font cause commune puisqu'ils ont énoncé leurs conclusions en des termes presque identiques». Puis la Cour en conclut que les deux gouvernements «ne comptent, en ce qui concerne la désignation d'un juge *ad hoc*, que pour une seule Partie» [*Plateau continental de la mer du Nord, ordonnance du 26 avril 1968, C.I.J. Recueil 1968*, p. 10.].

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Ce jugement confirme ainsi le critère retenu antérieurement pour déterminer si deux Etats font cause commune : seules leurs conclusions sont déterminantes à cet égard. Mais il marque en outre qu'il appartient à la Cour et non aux parties de prendre la décision requise. Les deux gouvernements avaient en l'espèce désigné la même personne pour siéger comme juge *ad hoc*. La Cour aurait pu se contenter de constater qu'il en était ainsi. Elle ne l'a pas fait et a entendu déterminer s'il y avait ou non cause commune. Mais, là encore, elle ne s'est pas contentée de l'affirmation des parties. Elle a vérifié ce qu'il en était au vu des conclusions des deux Etats.

12. La jurisprudence ainsi réaffirmée et développée a trouvé une nouvelle occasion d'application dans les affaires de la *Compétence en matière de pêcheries*. Dans ces affaires, deux requêtes avaient successivement été déposées contre l'Islande le 14 avril 1972 par le Royaume-Uni et le 5 juin 1972 par la République fédérale d'Allemagne. Par des ordonnances parallèles rendues dans chaque cas la Cour avait, le 17 août 1972, indiqué certaines mesures conservatoires et fixé le lendemain les délais de production des mémoires sur la compétence.

Un juge britannique siégeait en l'affaire, mais ni l'Islande, ni l'Allemagne ne disposaient d'un juge de leur nationalité. Dès le 21 juillet 1972, l'Allemagne fit connaître son intention de nommer un juge *ad hoc* et, le 31 octobre, désigna à cet effet M. Mosler. Le Gouvernement islandais n'ayant pas réagi à cette désignation, le Greffier en informa l'agent de l'Allemagne et transmit le dossier à M. Mosler.

A la veille des audiences qui devaient porter sur la compétence de la Cour dans les deux affaires, la Cour eut cependant des doutes sur sa composition et le greffier, le 4 janvier 1973, adressa aux agents une lettre selon laquelle la Cour :

> «after deliberating on the question, is unable to find that the appointment of a judge *ad hoc* by the Federal Republic of Germany in this phase of the case would be admissible. This decision affects only the present phase of the proceedings, that is to say that concerning the jurisdiction of the Court, and does not in any way prejudice the question whether, if the Court finds that it has jurisdiction, a judge *ad hoc* might be chosen to sit in the subsequent stages of the case.» [*C.I.J. Mémoires, Compétence en matière de pêcheries*, vol. II, p. 421.]

Cette décision fut confirmée dans les mêmes termes par le président à l'ouverture des audiences [*C.I.J. Mémoires, Compétence en matière de pêcheries*, vol. II, p. 120.].

Elle fut précisée dans l'arrêt du 2 février 1973 sur la compétence de la Cour dans l'affaire de la *Compétence en matière de pêcheries (République fédérale d'Allemagne c. Islande)* où :

> «La Cour, tenant compte de l'instance introduite par le Royaume-Uni contre l'Islande ... ainsi que de la composition de la Cour en la présente affaire où siège un juge ayant la nationalité du Royaume-Uni, a néanmoins décidé, par huit voix contre cinq, qu'en la présente phase relative à la compétence de la Cour les deux Parties faisaient cause commune au sens de l'article 31, paragraphe 5 du Statut, ce qui justifiait le rejet de la demande de la République fédérale d'Allemagne concernant la désignation d'un juge ad hoc.» [Arrêt du 2 février 1973, *C.I.J. Recueil 1973*, p. 51, par. 7.]

L'Islande, de son côté, n'avait cependant pas désigné de juge *ad hoc*. Lorsqu'on en arriva à l'examen du fond, l'Allemagne, tout en maintenant son droit à procéder à une telle désignation, fit connaître qu'elle n'insisterait pas pour désigner son propre juge «tant que cette situation prévaudrait» [*C.I.J. Mémoires, Compétence en matière de pêcheries*, vol. II, p. 457.].

La solution retenue dans la phase sur la compétence confirme cependant la jurisprudence antérieure selon laquelle deux Etats font cause commune dès lors qu'ils présentent les mêmes conclusions, quelle que soit l'argumentation exposée à l'appui de ces conclusions. En l'espèce le Royaume-Uni et la République fédérale d'Allemagne soutenaient que la Cour était compétente pour connaître de leur action. Mais, en ce qui concerne la compétence *ratione personnae*, ils le faisaient sur des bases distinctes. A cet égard, la République fédérale d'Allemagne était en effet dans une situation différente de celle du Royaume-Uni. Elle n'était pas membre des Nations Unies et n'était pas partie au Statut. Dès lors, elle n'invoquait pas une déclaration de juridiction obligatoire déposée en application de l'article 36, paragraphe 2, du Statut (comme le faisait le Royaume-Uni), mais sur une déclaration du 29 octobre 1971, par laquelle elle avait déclaré accepter la juridiction de la Cour

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conformément à l'article 35, paragraphe 2, du Statut et à la résolution 9 (1946) du Conseil de sécurité du 15 octobre 1946. Or l'Islande avait contesté que cette déclaration ait pu couvrir l'instance *ratione temporis*. [*C.I.J. Mémoires, Compétence en matière de pêcheries*, vol. II, p. 94; voir aussi l'arrêt du 2 février 1973, *C.I.J. Recueil 1973*, p. 54 et 55.]

La Cour a cependant estimé que peu importait cette différence de situation entre le Royaume-Uni et l'Allemagne. L'essentiel demeurait que les deux Etats concluaient à la compétence de la Cour. Cette identité de conclusions impliquait cause commune.

Si, sur ce dernier point, l'arrêt rendu ne fait que confirmer de manière éclatante la jurisprudence antérieure, on doit cependant noter que cette jurisprudence trouve ainsi à s'appliquer dans une nouvelle configuration procédurale. En effet, dans l'affaire du *Régime douanier entre l'Allemagne et l'Autriche*, soumise à la Cour permanente, les Etats intervenants faisaient valoir leur point de vue dans une procédure unique d'avis consultatif. Dans les affaires du *Sud Ouest africain* et du *Plateau continental de la mer du Nord*, les demandeurs avaient introduit des requêtes distinctes. Mais, dans ces deux derniers cas, la Cour internationale de Justice avait joint ces requêtes et prononcé un seul et unique arrêt.

En revanche, dans les affaires de la *Compétence en matière de pêcheries*, la Cour n'a pas prononcé une telle jonction et a rendu deux séries d'arrêts distincts, tant sur la compétence que sur le fond. Mais cela ne l'a pas empêchée de regarder le Royaume-Uni et l'Allemagne comme faisant «cause commune» dans la première phase de la procédure. Ainsi, faire «cause commune» consiste bien pour deux Etats à présenter les mêmes conclusions à la Cour, que celles-ci le soient dans une requête unique ou dans deux requêtes distinctes et que ces dernières soient jointes ou non. Peu importe ce détail procédural.

13. Au total, la jurisprudence de la Cour permanente et celle de la Cour internationale de Justice se présentent de manière parfaitement cohérente :

> *a) les gouvernements qui, devant la Cour, arrivent aux mêmes conclusions doivent être considérés comme faisant cause commune. Peu importe dans cette perspective l'argumentation des Parties, seules les conclusions sont déterminantes* (jurisprudence constante);
>
> *b)* lorsque des *exceptions d'incompétence et d'irrecevabilité* sont soulevées *in limine litis*, il convient, dans la première phase de la procédure, d'apprécier l'attitude des Parties au regard de ces exceptions. C'est ainsi que si elles concluent à la compétence de la Cour, elles doivent être regardées comme faisant cause commune (affaires de la *Compétence en matière de pêcheries*);
>
> *c) il appartient à la Cour d'en décider indépendamment de l'attitude des parties* (affaire du *Plateau continental de la mer du Nord*);
>
> *d) cette solution s'applique, qu'il y ait jonction des requêtes* (affaire du *Sud Ouest africain* et du *Plateau continental de la mer du Nord*) *ou que celles-ci demeurent distinctes* (affaires de la *Compétence en matière de pêcheries*).

LES CIRCONSTANCES DE L'ESPECE

14. En l'espèce le Royaume-Uni et les Etats-Unis développent dans la présente phase de la procédure une même argumentation sur deux plans. Ils soutiennent tout d'abord, en termes presque identiques, que le différend porté devant la Cour ne concerne pas l'application ou l'interprétation de la convention de Montréal du 23 septembre 1971 pour la répression d'actes illicites dirigés contre la sécurité de l'aviation civile et que, par suite, l'article 14 de cette convention ne donne pas compétence à la Cour pour connaître de l'affaire. Ils exposent en second lieu que le Conseil de sécurité a approuvé diverses résolutions imposant à la Libye l'obligation de livrer les suspects, que ces résolutions adoptées en application du chapitre VII de la Charte s'imposent à la Libye conformément à l'article 25 et l'emportent sur toute obligation conventionnelle (et notamment sur la convention de Montréal) conformément à l'article 103. Ils en déduisent que les demandes libyennes sont irrecevables ou sont devenues sans objet.

Le Royaume-Uni, aux termes de ses exceptions préliminaires, prie par suite

> «la Cour de dire et juger :

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> qu'elle n'a pas compétence pour se prononcer sur les demandes présentées par la Jamahiriya arabe libyenne à l'encontre du Royaume-Uni
>
> et/ou
>
> que les demandes présentées par la Jamahiriya arabe libyenne à l'encontre du Royaume-Uni ne sont pas recevables».

Quant aux Etats-Unis, ils prient «la Cour d'accueillir les exceptions à la compétence de la Cour qu'ils ont présentées et de décliner de connaître de l'affaire».

Dans ces conditions, il était clair que dans cette phase de la procédure les Etats-Unis et le Royaume-Uni présentent à la Cour les mêmes conclusions et font donc cause commune. Cette communauté d'intérêt éclaire d'ailleurs la décision du président Schwebel de ne présider la Cour ni dans l'une ni dans l'autre affaire et celle de Mme Higgins de se déporter dans les deux cas. L'existence d'une cause commune trouve surtout son expression dans les jugements rendus par la Cour qui sont très proches dans leur motivation et quasiment identiques dans leur dispositif. La demande britannique tendant à la désignation d'un juge *ad hoc* aurait dû être rejetée conformément à la jurisprudence constante rappelée ci-dessus.

15. Dans ses observations écrites, le Royaume-Uni développe cependant à l'encontre d'une telle solution quatre arguments qu'il convient d'examiner successivement.

16. Il se prévaut en premier lieu du «droit de tout Etat partie à une affaire devant la Cour d'obtenir qu'y siège un juge *ad hoc*, lorsqu'aucun juge titulaire de la nationalité dudit Etat n'est à même de prendre part à l'instance». Ce droit serait «fondamental».

Cet argument ne saurait être retenu. Certes le Statut de la Cour reconnaît aux Etats *le droit de désigner un juge ad hoc*, que la Cour soit saisie par compromis ou par voie de requête unilatérale. Mais ce droit procède d'un principe encore plus fondamental, celui de l'égalité des parties. Or, dans certaines hypothèses, cette égalité peut être rompue du fait même de la désignation de juges *ad hoc*. Il en est ainsi lorsqu'un des Etats faisant cause commune avec d'autres a déjà un juge sur le siège. En pareil cas, le droit statutaire à la désignation d'un juge *ad hoc* perd tout fondement et le principe d'égalité exige qu'un tel juge ne soit pas désigné. Tel est le sens du paragraphe 5 de l'article 31 du Statut et telle est la situation en l'espèce.

17. Le Royaume-Uni soutient en deuxième lieu que *l'article 31, qui userait du singulier, «s'applique séparément à chaque affaire inscrite au rôle de la Cour»*. «En présence de deux affaires distinctes entre deux séries de parties (même si l'une des parties est en cause dans les deux affaires), le paragraphe 5 de l'article 31 ne trouve pas à s'appliquer.» En l'espèce la Libye a présenté deux requêtes distinctes contre les Etats-Unis et le Royaume-Uni. Le texte invoqué ne serait par suite pas applicable, «sauf à joindre les deux instances».

Or, selon le Royaume-Uni «la Cour a suivi constamment la pratique qui consiste à ne pas ordonner la jonction sans l'accord des parties aux deux affaires». Du fait notamment de la position des Parties, les conditions de la jonction ne seraient dès lors pas remplies en l'espèce. Les deux affaires étant distinctes, il ne saurait y avoir cause commune.

Cet argument est loin d'être convaincant. Il avait été écarté dans les affaires de la *Compétence en matière de pêcheries* dans lesquelles la Cour avait estimé que l'Allemagne faisait cause commune avec le Royaume-Uni, bien que les deux Etats aient présenté des requêtes distinctes. Il ne trouve en outre aucun fondement dans les textes applicables. Le paragraphe 5 de l'article 31 du Statut et l'article 36 du Règlement n'usent ni du singulier ni du pluriel, puisqu'ils ne visent ni «l'affaire» ni «les affaires». Seul l'article 37 du Règlement mentionne le cas où un membre de la Cour n'est pas en mesure de siéger dans «une phase d'une affaire». Mais cette rédaction reflète l'article 24 du Statut qui envisage le cas où l'un des membres de la Cour ne peut siéger dans «une affaire déterminée». Elle est aisément explicable dans la mesure où la désignation d'un juge *ad hoc* en vue de remplacer un membre de la Cour qui s'est déporté n'est concevable que dans l'affaire dans laquelle l'Etat dont ce membre a la nationalité est partie. Aussi bien, en l'espèce, le Royaume-Uni n'a-t-il jamais demandé la désignation d'un juge *ad hoc* dans l'instance opposant la Libye et les Etats-Unis, alors que Mme Higgins s'était également déportée dans cette instance.

Au surplus, la jurisprudence traditionnelle de la Cour trouve avant tout son fondement dans les principes mêmes qui sous-tendent ces textes. Admettre en effet que des Etats ne puissent faire cause commune que s'ils sont impliqués dans une même instance serait en

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définitive laisser la décision à prendre en ce qui concerne la désignation des juges *ad hoc* à la discrétion du ou des demandeurs et priver ainsi la Cour de la compétence qu'elle tient du Statut et du Règlement.

Dans un tel système la Cour serait en effet dans l'incapacité de déclarer qu'il existe cause commune entre plusieurs demandeurs présentant des conclusions identiques dans des requêtes distinctes. Elle ne serait pas davantage en mesure d'établir l'existence d'une cause commune entre plusieurs défendeurs présentant des conclusions identiques dans des affaires ayant fait l'objet de requêtes distinctes. En définitive, le ou les demandeurs seraient maîtres de la procédure et l'on imagine quel profit ils pourraient être tentés d'en tirer.

Bien plus, on voit mal pourquoi la solution à retenir en ce qui concerne l'existence d'une cause commune serait différente selon que la Cour est saisie de requêtes distinctes (comme dans les affaires de la *Compétence en matière de pêcheries* ou dans les présentes affaires) ou d'une requête unique (comme dans l'affaire de l'*Or monétaire pris à Rome en 1943*). Un tel formalisme n'aurait aucune justification et serait étranger à la tradition de la Cour qui, «exerçant une juridiction internationale, n'est pas tenue d'attacher à des considérations de forme la même importance qu'elles pourraient avoir en droit interne» [Arrêt du 30 août 1924, *Concessions Mavrommatis en Palestine,, C.P.J.I série A nº 2*, p. 34; arrêt du 2 décembre 1963, *Cameroun septentrional, C.I.J. Recueil 1963*, p. 28; arrêt du 26 juin 1992, *Certaines terres à phosphates à Nauru (Nauru c. Australie), C.I.J. Recueil 1992*, p. 265.].

18. A l'encontre de ce raisonnement on pourrait cependant faire valoir qu'en cas de requêtes ou de défenses distinctes contenant des conclusions identiques, la Cour serait en mesure de rectifier la situation et d'éviter toute fraude en prononçant la jonction des instances, puis, une fois celle-ci opérée, en constatant que les parties font en réalité cause commune.

Cette solution se heurte toutefois à une objection fondamentale, à savoir que *la jonction d'instance et la reconnaissance de cause commune n'obéissent pas aux mêmes critères*. La jonction d'instances a pour but de permettre à la Cour de se prononcer sur deux requêtes distinctes par un jugement unique. Elle peut être décidée dans des affaires opposant les mêmes parties et ayant le même objet (comme dans l'affaire du *Statut juridique du territoire du sud-est du Groënland* [*Ordonnances du 2 et 3 août 1932, C.P.J.I. série A/B nº 48*, p. 268.]). Elle peut l'être aussi dans des affaires opposant les mêmes parties, mais ayant des objets différents (comme dans l'affaire de *Certains intérêts allemands en Haute-Silésie polonaise* [Arrêt nº 7 du 5 février 1926, *C.P.J.I. série A nº 7*, p. 95.] ou dans le cas des *Appels contre certains jugements du tribunal arbitral mixte hungaro-tchécoslovaque* [Ordonnance du 12 mai 1933, *C.P.J.I. série C nº 68*, p. 290.]). Enfin la jonction d'instances distinctes présentées par des Etats différents est également possible. Il peut y être procédé dans le cas où des Etats font cause commune (comme dans les affaires du *Sud-Ouest africain*). Mais la cause commune n'implique pas nécessairement la jonction, en particulier si les parties elles-mêmes s'y opposent (comme le prouvent les affaires de la *Compétence en matière de pêcheries*).

En effet, certains Etats peuvent présenter à la Cour des conclusions identiques tout en développant des argumentations différentes. Ils font bien alors cause commune, mais il serait tout à fait inopportun de prononcer une jonction pour aboutir à un jugement unique qui devrait se prononcer de manière distincte sur ces divers arguments. Si, dans l'affaire du *Plateau continental de la mer du Nord*, la jonction a été prononcée par la Cour, c'est que :

> «les arguments juridiques du Danemark et des Pays-Bas ont été en substance les mêmes, sauf sur certains points de détail, et qu'ils ont été présentés soit en commun, soit en étroite coopération» [Arrêt du 20 février 1969, *C.I.J. Recueil 1969*, p. 19, par. 11.].

Si à l'inverse dans les affaires de la *Compétence en matière des pêcheries*, la jonction n'a pas été prononcée lorsqu'on en est arrivé au fond, c'est parce que la Cour

> «a considéré que, si les questions juridiques essentielles semblaient identiques dans les deux affaires, il existait des divergences quant à la position et aux conclusions des deux demandeurs» [Arrêts du 25 juillet 1974, *C.I.J. Recueil 1974*, p. 6, par. 8 et p. 177, par. 8.]

En outre, le point de vue des parties ne pèse pas de la même manière sur la décision de la Cour lorsqu'il s'agit de déterminer s'il y a cause commune ou s'il y a lieu à jonction. Dans le premier cas, en effet, la décision est prise en fonction de critères purement objectifs, et c'est à la Cour de se prononcer en appliquant ces critères. L'accord des parties n'y suffit pas comme le prouve l'affaire du *Plateau continental de la mer du Nord* dans laquelle la Cour a

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vérifié elle-même si, conformément au compromis, le Danemark et les Pays-Bas faisaient bien cause commune.

En revanche, en matière de jonction, la Cour tient le plus grand compte des voeux des parties, comme le montrent les affaires de l'*Incident aérien du 27 juillet 1955 (Israël c. Bulgarie)* ou celle des *Essais nucléaires* (1973) et, comme la Cour elle-même l'a précisé dans les cas de la *Compétence en matière de pêcheries* où elle a relevé à l'appui de sa décision qu'«une jonction aurait été contraire» aux «voeux» des demandeurs.

Dans ces conditions, on comprend mieux la sagesse de la jurisprudence traditionnelle de la Cour. Il est certain, comme l'a déjà noté la doctrine, que la jonction d'instance et la désignation d'un juge *ad hoc* lorsque les parties sont considérées comme faisant cause commune correspondent à deux hypothèses différentes qui ne se présentent pas nécessairement ensemble [G. Guyomar, *Commentaire du Règlement de la Cour internationale de Justice*, p. 300.]. On ne saurait confondre les deux concepts distincts de jonction d'instance et de cause commune et faire dépendre la seconde de la première : il est des circonstances dans lesquelles les parties font cause commune dans des instances distinctes et où la jonction n'est pas souhaitable. La cause commune n'en doit pas moins pouvoir être alors constatée par la Cour.

19. Le Royaume-Uni souligne en troisième lieu que la quasi-totalité des affaires dont la Cour a eu à connaître dans le passé «comportait des instances parallèles introduites par deux demandeurs contre un défendeur unique». Or, en l'espèce, *deux défendeurs s'opposent à un demandeur unique*. La situation serait donc toute différente et une solution différente s'imposerait.

On voit mal cependant pourquoi les défendeurs seraient pour l'application du Statut et du Règlement traités sur ce point différemment des demandeurs. Les textes mentionnés visent les parties en général et celles-ci peuvent à l'évidence faire cause commune, tant comme défenderesses que comme demanderesses.

Dans la première phase des procédures, les conclusions de demandeurs faisant cause commune tendent nécessairement à faire reconnaître la compétence de la Cour et la recevabilité de la ou des requêtes (comme dans les affaires du *Sud Ouest africain* et de la *Compétence en matière de pêcheries*). Dans cette même phase, les conclusions des défendeurs faisant cause commune tendent à nier la compétence de la Cour et la recevabilité de la ou des requêtes (comme dans les affaires de Lockerbie). On voit mal pourquoi ces deux cas de figure seraient traités différemment.

20. Enfin le Royaume-Uni souligne que les *arguments* qu'il développe, dès cette phase de la procédure, bien que «compatibles» avec ceux avancés par les Etats-Unis *«ne sont pas identiques»*. Chacun a fait valoir «les moyens de fait et de droit de sa cause de la façon qu'il a jugé la meilleure». Pour ce motif encore, il n'y aurait pas cause commune.

Cette argumentation procède d'une confusion entre «conclusions» et «moyens» des parties (confusion que font trop souvent les Etats comparaissant devant la Cour comme celle-ci l'a relevé explicitement dans l'affaire des *Minquiers et des Ecréhous (France/Royaume-Uni)* [Arrêt du 17 novembre 1953, *C.I.J. Recueil 1953*, p. 52.])

Font cause commune deux Etats qui avancent les mêmes conclusions, même si leurs arguments divergent quelque peu. En effet faire «cause commune», c'est dans tous les systèmes de droit rechercher conjointement un même résultat en présentant des conclusions tendant à la même fin. [*Dictionnaire de la terminologie du droit international*, p. 104 et 105.] Aussi bien est-ce parce que cette fin est unique que les auteurs du Statut ont prévu en pareil cas la désignation d'un juge *ad hoc* unique. Il serait trop aisé pour deux ou plusieurs Etats de tourner cette règle en présentant des conclusions identiques fondées sur des argumentations différentes et d'obtenir par un tel biais la désignation de plusieurs juges *ad hoc*. Les conclusions, et seules les conclusions, doivent être prises en considération pour l'application du paragraphe 5 de l'article 31 du Statut.

Au surplus n'est-il pas inutile de noter qu'en l'espèce les argumentations mêmes des Etats-Unis et du Royaume-Uni sont extrêmement proches. Elles reposent dans les deux cas sur une interprétation restrictive commune de l'article 14 de la convention de Montréal et sur l'impact des résolutions du Conseil de sécurité.

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CONCLUSION

21. Au total, les Etats-Unis et le Royaume-Uni présentent dans cette phase de la procédure les mêmes conclusions sur lesquelles la Cour a statué par deux jugements comportant une motivation analogue et des dispositifs quasiment identiques. Ils faisaient cause commune et par suite le Royaume-Uni n'était pas en droit de désigner un juge *ad hoc*. La Cour en a décidé autrement et ceci nous a donné le plaisir de siéger à nouveau avec sir Robert Jennings dont nous avons pu apprécier une nouvelle fois les éminentes qualités. Nous n'en regrettons pas moins une décision non motivée qui constitue une première dans l'histoire de la Cour et qui nous paraît contraire au Statut, au Règlement et à la jurisprudence.

(Signé) Mohammed BEDJAOUI.

(Signé) Gilbert GUILLAUME.

(Signé) Raymond RANJEVA.

DÉCLARATION COMMUNE DE MM. BEDJAOUI, RANJEVA ET KOROMA

Nous sommes de ceux qui adhèrent pleinement tant aux motifs qu'au dispositif du présent arrêt.

La qualification de *non exclusivement préliminaire* attribuée à l'exception du Royaume-Uni, selon laquelle les résolutions du Conseil de sécurité auraient privé les demandes de la Libye de tout objet, et le renvoi de son examen au fond, signifient à notre avis qu'il ne suffit pas d'invoquer les dispositions du chapitre VII de la Charte pour mettre fin de manière automatique et immédiate à tout débat judiciaire au sujet des décisions du Conseil de sécurité. Lorsque la Cour en arrivera au fond elle aura à se prononcer à cet égard.

(Signé) Mohammed BEDJAOUI.

(Signé) Raymond RANJEVA.

(Signé) Abdul G. KOROMA.

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DISSENTING OPINION OF JUDGE SIR ROBERT JENNINGS

I very much regret that I have to dissent from the decision of the majority of the Court in this case.

There are two main issues: the question of jurisdiction; and the question of admissibility. As I differ from the majority on both questions, I should briefly say why; dealing first with jurisdiction.

Jurisdiction

Jurisdiction of the Court in this case will be established if, and in so far as, there is shown to be a dispute or disputes "concerning the interpretation or application of this Convention", within the meaning of Article 14, paragraph 1, of the 1971 Montreal Convention for the Suppression of Unlawful Acts against the Safety of Civil Aviation. To find the answer to this question it is necessary to look at two things: Libya's submissions, not only in the present phase, but also in its Application of 3 March 1992 initiating the case against the United Kingdom — this in order to find out what is said to be disputed; and secondly, the provisions of the Convention that are said to be involved in the dispute. As the relevant provisions of the Convention are referred to in the submissions we shall consider the submissions (or requests as they are described in the Application and the Memorial) in turn. There are four of them: they request the Court to adjudge and declare as follows, in *(a)*; *(b)*; *(c)* and *(d)* below.

(a) ***That the Montreal Convention is applicable to this dispute***

The question the Court has to decide is which, if any, items of the Libyan claims are both disputed by the United Kingdom and necessarily "concern the interpretation or application" of the Montreal Convention, and therefore generate jurisdiction under Article 14 of the Convention. The broad terms of this submission *(a)* merely beg the question of which particular provisions of the Convention are supposed to be involved.

The citation of the Convention as a whole also invites speculation as to whether it was ever intended to deal with acts of terrorism allegedly committed by persons actually employed by a government also allegedly involved in the commission of those acts.

It is noteworthy that this submission *(a)* did not appear at all in the Libyan Application which initiated the case. It raises a question, now that the Court has found that it has some jurisdiction, how far Libya might further seek to change the content and nature of its case in pursuance of its reservation of "the right to supplement and amend these submissions as appropriate in the course of further proceedings".

(b) ***That Libya has fully complied with all of its obligations under the Montreal Convention and is justified in exercising the criminal jurisdiction provided for by that Convention***

There is here no dispute under the Convention because the United Kingdom has not sought to dispute that Libya has complied with all its obligations under the Convention. There was nothing contrary to the Convention in the United Kingdom's requesting the extradition of the two suspects. Nor is there any dispute that, under the terms of the Montreal Convention, Libya is justified in exercising its own criminal jurisdiction provided for by that Convention. The United Kingdom contention in this case is that Libya is not now justified in exercising that jurisdiction in so far as to do so would be contrary to decisions of the Security Council made under Chapter VII of the Charter; that is not a matter arising under the provisions of the Convention but one concerning the interpretation or application of the United Nations Charter; and to pretend that it is one that comes within Article 14, paragraph 1, of the Convention is not free from absurdity.

(c) ***That the United Kingdom has breached, and is continuing to breach, its legal obligations to Libya under Articles 5 (2), 5 (3), 7, 8 (3) and 11 of the Montreal Convention***

It is necessary to consider each of these provisions of the Convention in turn to see whether there is a dispute which comes within the scope of Article 14 of the Convention.

Article 5 (2)

This is the Article which requires a party to "take such measures as may be necessary to establish its jurisdiction" over offences against the Convention, in lieu of extradition, where the offender is "present in its territory".

This creates a legal obligation upon Libya, as on all parties to the Convention, which obligation, according to Libya, it has indeed carried out. It is difficult to understand how it can be said that the United Kingdom is in breach, and seemingly continuous breach, of that obligation upon Libya, much less to understand where the supposed dispute might be. Article 5, paragraph 2, is concerned with legislation and other measures which Libya, as a party to the Convention, is obligated to implement. It claims to have done so, and this has not been denied by the United Kingdom.

Article 5 (3)

> "This Convention does not exclude any criminal jurisdiction exercised in accordance with national law."

Again, there is simply no scintilla of a dispute here between the Parties about the interpretation or application of the Convention. In fact this provision is entirely plain and there is nothing much to dispute about it.

Article 7

This provides:

> "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."

Again, it is difficult to understand in what way the United Kingdom can be said to be in breach of this Article of the Convention.

The United Kingdom's request for extradition is not in breach of the Convention for extradition but is in accord with an alternative procedure actually contemplated by Article 7 itself. Even if the insistence on extradition rather than domestic prosecution be a breach of the Convention, then the complaint should be addressed to the Security Council and not to selected Members of the Security Council. In any event it is difficult to see in what way Libya is actually prevented from prosecuting the two suspects and in fact according to her own pleading she is already in the process of doing precisely that — a process which has been curiously prolonged.

Article 7 of the Convention obliges Libya, as the place where the alleged offenders are to be found, *either* to extradite *or*, if she does not extradite, then herself to ensure that she prosecutes the offenders. The latter option is qualified by the Security Council resolutions, which by their terms remove the alternative option of domestic prosecution (surely a reasonable step where the charge is that the State party to the Convention is itself allegedly implicated in the offence). Libya disputes the effect of the Security Council resolutions; but this is not a dispute with the United Kingdom about the Convention but a dispute with the Security Council about its resolutions. It is not a dispute that can be reasonably categorized as one coming within the intended ambit of Article 14, paragraph 1. For it is in no way a dispute that can be settled by reference to Article 7 or to any other part of the Convention. The real dispute is one about the meaning and applicability of the Charter of the United Nations, about Articles 25 and 103 in particular and about the meaning and application of Security Council resolutions 731, 748 and 883. The attempt to tack this "dispute" onto Article 14, paragraph 1, of the Convention, via Article 7, is an artifice that really ought not to beguile this Court. And in so far as it is now being entertained by the Court one must have in mind the multitudinous possibilities it opens up of using the normal and common jurisdiction clauses of bilateral treaties to frustrate and delay the peacekeeping measures of the Security Council.

Moreover, although there does seem to be some dispute between Libya and the United Kingdom about the meaning and interpretation of the Security Council resolutions; and if indeed according to Libya's own interpretation those resolutions do not at all require the surrender of the suspects, then the alternative option provided by Article 7, of a way in which Libya can perform her Convention obligations, actually remains intact.

It will be convenient at this point to mention the device with which the Court's Judgment endeavours to neutralize the effect of the Security Council resolutions made under its powers conferred by Chapter VII of the Charter. It is true that "the Security Council resolutions 748 (1992) and 883 (1993) were adopted after the filing of the Application on 3 March 1992", and that, "In accordance with its established jurisprudence, if the Court had jurisdiction on that date, it continues to do so" (Judgment, para. 38). But this fact is irrelevant. The Court's proposition assumes that there was, at the date of the Application, jurisdiction over a dispute covered by Article 14, paragraph 1, of the Convention, a dispute the effect of which the resolutions seek to change. This is not so. The point is not that the Security Council resolutions sought to take away an already established jurisdiction of the Court, the point is that there never was in any real sense any dispute between the Parties about the Montreal Convention. It is true that the legal status and meaning of all these Security Council resolutions have been vigorously questioned by Libya under cover of the present proceedings; but this is not a dispute under Article 14, paragraph 1, of the Convention.

Article 8, paragraphs 2 and 3

In its Application Libya cited Article 8, paragraph 2, which provides:

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> "If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offences. Extradition shall be subject to the other conditions provided by the law of the requested State."

In its Memorial submissions, however, Libya cited only paragraph 3 of Article 8 which provision imposes an obligation upon States:

> "which do not make extradition conditional on the existence of a treaty shall recognize the offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State".

Again, one is simply at a loss to know in what way the United Kingdom is supposed to be in continuous breach with respect to either of these provisions, much less how it can be said that there is a dispute about its interpretation or application between the United Kingdom and Libya.

Article 11

This is the article creating a treaty obligation to:

> "afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences. The law of the State requested shall apply in all cases."

Libya alleges that the United Kingdom had not done as much as it was obliged to do in attempting to provide the assistance provided for under this Article. There is in any event no dispute here about the interpretation of the Convention; there *is* a question whether it applies, given the changed situation brought about by the Security Council resolutions. But that again is a question, or even dispute, that cannot be resolved by reference to the provisions of the Convention, about which there is no real dispute. It is a dispute about the effect of the resolutions and that dispute is not one that can be said to be one contemplated by Article 14 of the Convention.

In any case it will be noted that the "affording" (not a strong word at all) of information is, by the very terms of this Article, qualified, in this case, by the relevant Scottish law. Secondly, the United Kingdom surely has provided enough information to form a viable basis for a Libyan prosecution of the suspects, if that is how Libya wishes to proceed. Indeed one might reasonably have supposed that enough information and material has been provided to this Court. Thus, it is somewhat fanciful even to argue that there could be a dispute between the United Kingdom and Libya about the application of Article 11 of the Convention. Moreover, Libya has argued (see para. 26 of this Judgment) that "Libya has exercised its jurisdiction over the two alleged offenders on the basis of its Penal Code, and the Respondent should not interfere with the exercise of that jurisdiction". But this is manifestly incompatible with Libya's submission under Article 11 of the Convention, and Libya cannot have it both ways. So, quite apart from the question whether there is an Article 14 dispute, it is very doubtful whether there is here any dispute at all.

(d) ***That the United Kingdom is under a legal obligation to respect Libya's right not to have the Convention set aside by means which would in any case be at variance with the principles of the United Nations Charter and with the mandatory rules of general international law prohibiting the use of force and the violation of the sovereignty, territorial integrity, sovereign equality and political independence of States***

It is interesting to note how this submission, as it is in the Memorial version, has been radically amended since its first appearance in the Application (then submission *(c)*, conveniently reproduced in *I.C.J. Reports 1992*, at p. 7). Originally it asked the Court to adjudge and declare that the United Kingdom was

> "under a legal obligation immediately to cease and desist from such breaches and from the use of any and all force or threat of force against Libya, including the threat of force against Libya, and from all violations of the sovereignty, territorial integrity, and the political independence of Libya".

In the latest version of this submission, the "immediately" has disappeared. No doubt it was thought inappropriate after rather more than five years of undisturbed peace with the United Kingdom. There might again also be thought to be a question how far a State may, by simply reserving "the right to supplement and amend" its submissions, change at its convenience and expediency as the case proceeds, the basis of the case made in its original Application, at least without seeking the leave of the Court.

No doubt the most carefully considered and devised change is the introduction of the idea of "Libya's right not to have the Convention [i.e. the Montreal Convention] set aside by means", etc. This idea is no doubt intended to suggest that setting aside the Convention brings the dispute under the rubric of "the application" of the Convention as that phrase is used in Article 14, paragraph 1, the jurisdiction article, of the Convention.

It might suggest this but in my view in no wise establishes it. The only "setting aside" of some parts of the Convention régime, if it can be said to occur at all, is in consequence of the Security Council resolutions. So any dispute over the "setting aside" is between Libya and the Security Council, and not with the United Kingdom. This dispute could not conceivably be said to come within Article 14, paragraph 1, of the Convention.

For all the above reasons the Court, in my view, does not have jurisdiction over this dispute. But before leaving the matter of jurisdiction there is a further comment I wish to make. That is that I find some aspects of the Applicant's argument about jurisdiction to be somewhat specious. In particular, the arguments deployed in the attempt to bring this essentially Security Council matter somehow, indeed anyhow, within the scope of Article 14, paragraph 1, of the Convention are factitious. The arguments are clever and even ingenious, and have been brilliantly successful in producing a five-year and more delay which was no doubt their primary purpose. But the whole endeavour constitutes a highly artificial device. It is fashioned to attract the legal cast of mind; though I believe most intelligent lay persons would give it very short shrift. It is indeed ironic that the jurisdictional clause of a Convention whose whole purpose is to control international terrorism over aircraft, should be thus employed, it seems successfully, to afford protection to persons alleged to have been involved in such terrorism who are nationals and officials of a State also alleged itself to have been thus involved. It seems extraordinary to interpret the Convention in such a way that a State, itself alleged to have been involved in the terrorist act, should have the sole right to try its own intelligence agents alleged to have carried out the crime. This is not only to nullify in this case the very purpose of the Convention, but also to fly in the face of common sense. I can only regret exceedingly that this Court has succumbed to the temptations so skilfully laid in its path.

The Question of Admissibility

If the Court had taken what I regard to be both the correct view, and the wiser view, on the question of jurisdiction, there would have been no need in its Judgment to enter upon the rather less firm ground of admissibility. But in view of the Court's stance it is necessary to say something about this question.

Before entering upon the main substance of the admissibility argument, I wish first to look at the narrower, technical but at first sight puzzling Article 79, paragraph 7, of the Court's Rules, which, in an article headed "Preliminary Objections", provides:

> "7. After hearing the parties, the Court shall give its decision in the form of a judgment, by which it shall either uphold the objection, reject it, or declare that the objection does not possess, in the circumstances of the case, an exclusively preliminary character. If the Court rejects the objection or declares that it does not possess an exclusively preliminary character, it shall fix time-limits for the further proceedings."

The puzzling aspect of this is the phrase "exclusively preliminary character". It is well known that this phrase was a reaction to what happened in the 1966 *South West Africa* cases (*I.C.J. Reports 1966*, p. 6), and in the *Barcelona Traction* case (*I.C.J. Reports 1970*, p. 3). But trying to provide against bad cases makes bad law. And, unfortunately, it is not easy to find *any* preliminary objection that can be said to be, in absolute terms, of an exclusively preliminary character. Even the question of jurisdiction, ordinarily regarded as being unquestionably preliminary does, probably as often as not, require some excursion into the merits; as indeed did that question in the present case.

The questions of admissibility, lack of object, and the like in the present case have, certainly in the arguments of both Parties, provoked very considerable excursions into the merits of the case. The question, therefore, arises whether that preliminary objection can be dealt with very simply by deciding that it is not "exclusively" of a preliminary character; though it is interesting that Libya was far from being content to rely on this possibility.

It is reasonable, therefore, to ask what is the *rationale* for taking certain pleas as preliminary matters. After all, all courts do it as a matter of course. The reason for doing so is surely that there are certain defences which, if they be accepted, result in the dismissal of the whole case there and then; so there is then no need to "fix time-limits for the further proceedings". Common sense demands, therefore, that such questions are examined first as "preliminary objections".

But what about the word "exclusively" — a strong word — in Article 79, paragraph 7, of the Court's Rules? Fortunately, the term is not there used without qualification. It is qualified by the phrase, "does not possess, *in the circumstances of the case*, an exclusively preliminary character" (emphasis added). It seems reasonable, therefore, to interpret "exclusively preliminary character" as referring to the quality of those pleas in a given case which, if accepted, signal the end of the case, and thus actually excluding the possibility of a merits stage.

This way of viewing the matter would appear to have been tacitly assumed by both Parties in the case; for those very considerable excursions into the merits during the oral proceedings both indicate that this inadmissibility plea is not exclusively preliminary in character in any literal or absolute sense, but, nevertheless, a finding that the case is not admissible would have been the end of the matter.

It is thus necessary, at the outset of this admissibility question, to examine the meaning of "exclusively preliminary character" because though it is clearly tempting just to dispose of the admissibility argument by deciding that the inadmissibility objection is not an "exclusively" preliminary matter, this would be to incur the risk of this riposte

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being usable against almost any party in any case wishing to enter a preliminary objection to the exercise of jurisdiction.

It could no doubt be argued, on the other hand, that, if a plea be so intimately connected with the merits as the present Appellant evidently appeared to assume, there could be something to be said for examining the admissibility plea along with a full merits argument. But where the preliminary objection has already been entertained and heard, that argument is self-defeating. I am for these reasons unable to go along with the Court in using the drafting of Article 79, paragraph 7, of the Rules, to dispose of these preliminary objections, whether to jurisdiction or admissibility, on this highly legalistic and juridically doubtful ground.

* *

We may now turn to what the Court decides on the substance of the admissibility plea.

The Court rightly says that the principal argument of the United Kingdom is that:

> "the issue or issues in dispute between it and the United Kingdom are now regulated by decisions of the Security Council, taken under Chapter VII of the Charter of the United Nations, which are binding on both Parties and that (if there is any conflict between what the resolutions require and rights or obligations alleged to arise under the Montreal Convention) the resolutions have overriding effect in accordance with Article 103 of the Charter" (see para. 41 of the Judgment).

The Court deals with this objection — apart, that is, from the Article 79 of the Rules point mentioned above — by an argument based upon the Court's decision in *Border and Transborder Armed Actions (Nicaragua* v. *Honduras)* (*I.C.J. Reports 1988*, p. 95, para. 66), that "The critical date for determining the admissibility of an application is the date on which it is filed". And it is of course true that the Security Council resolutions 748 and 883, made under Chapter VII, were made after the date of the Libyan Application in this case. This situation the Court regards as definitive and on that basis rejects the United Kingdom's pleading in this regard.

It is important, however, to note that the words cited by the Court from the *Armed Actions* case, are qualified by the remainder of the paragraph which is as follows:

> "It may however be necessary, in order to determine with certainty what the situation was at the date of filing of the Application, to examine the events, and in particular the relations between the Parties, over a period prior to that date, and indeed during the subsequent period. Furthermore, subsequent events may render an application without object, or even take such a course as to preclude the filing of a later application in similar terms." (*I.C.J. Reports 1988*, p. 95, para. 66.)

It appears from the Judgment in the present case that the Court regards the critical-date-of-the-application rule as applicable to controlling admissibility cases in general, and indeed only just manages to avoid a circular argument defining the very plea of inadmissibility in terms of this critical date rule; so that the way to avoid getting enmeshed with this rule is apparently to enter a plea which cannot be regarded as, or at any rate is not called, one of "admissibility".

But there is a serious argument of substance which, in the opinion of the writer, the decision of the Court applying that rule to the United Kingdom inadmissibility objection, has to encounter. One is bound to ask oneself whether the Court has fully appreciated and weighed the gravity of a decision to subject to the application-critical-date rule, an inadmissibility plea based squarely upon a decision of the Security Council under Chapter VII, and involving the peacekeeping operations of the Security Council. One must always have in mind other possible future cases. The practical effect of this decision is to establish an available procedure for delaying or frustrating decisions of the Security Council made in its peacekeeping capacity, is indeed to bring about a grave modification of the juridical and political scheme of the United Nations Charter, which the Court itself, as the Organization's principal judicial organ, is there, one might have supposed, to declare, explain and protect.

There is, however, another part of the Judgment over the non-admissibility defence to be considered; and that is the treatment of what is in effect the United Kingdom's fall-back position, that the case has, in consequence of the Security Council resolutions, become "without object", or "no case", or "moot"; these being different ways of expressing this particular objection. This, according to the Court, is no longer an "admissibility" matter and so not subject to the rule of the time-of-application critical date; though whether it could be equally expressed in the reverse, that it is not an admissibility question *because* it is not controlled by that critical date is far from clarified by the reasoning of the Judgment.

The Court, however, reaches the same conclusion as before, by now applying another equally artificial and legalistic consideration; the strict, literal or absolute interpretation of Article 79, paragraph 7, of the Rules of Court. This has already been looked at above. Nevertheless it must be added that the conclusion of the Court on this matter also, which is really, and in its substance, just another way of putting the inadmissibility argument, is open to the same grave objections as those expressed above in regard to the Court's decision under the admissibility heading. It seems unfortunate to say the least, that a preliminary objection involving the viability of the peacekeeping provisions of the Charter of the United Nations, should be dealt with on the basis of a legalistic argument grounded not in the Charter of the United Nations but in an interpretation of a somewhat controversial word — "exclusively" — in Article 79 of the Court's Rules.

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This case has also raised a question of basic principle of great importance which has been referred to in argument but which the present Judgment studiously avoids: the relationship between the respective competences of the Security Council and of the International Court of Justice as the "principal judicial organ of the United Nations". The Court in its Judgment has no doubt relegated this to the merits stage. It seems right, however, in this opinion to state one's present views on the question which in fact underlies every stage of this case; including the interim measures stage in 1992.

In every system of government there are political organs which make decisions on the basis of what may broadly be called political reasons; and there are courts and other judicial tribunals which make decisions on the basis of the interpretation and application of rules of law. Both kinds of decision are necessary in any civilized society governed by the rule of law. Neither kind of decision can be said to be *per se* superior to the other kind; they should rather be complementary.

But the different kinds of organs, political and judicial, may find themselves called upon to deal with the same matter, or different aspects of the same matter. How is the relationship between the two different organs and their respective decisions to be ordered? In a society governed by the rule of law this relationship is to be resolved according to the relevant principles and rules of constitutional and administrative law. It is precisely the lot of a court of justice to apply those principles and rules; as indeed has happened in this case. So, the task of the Court in this case, as I see the matter, is simply to apply international law.

The first principle of the applicable law is this: that all discretionary powers of lawful decision-making are necessarily derived from the law, and are therefore governed and qualified by the law. This must be so if only because the sole authority of such decisions flows itself from the law. It is not logically possible to claim to represent the power and authority of the law, and at the same time, claim to be above the law.

That this is true of the United Nations Security Council is clear from the terms of Article 24, paragraph 2, of the Charter:

> "2. In discharging these duties the Security Council shall act in accordance with the Purposes and Principles of the United Nations. The specific powers granted to the Security Council for the discharge of these duties are laid down in Chapters VI, VII, VIII, and XII."

I therefore wholly agree with the Libyan argument that the Security Council decisions and actions should in no wise be regarded as enjoying some sort of "immunity" from the jurisdiction of the principal judicial organ of the United Nations, though I ought perhaps to add that the United Kingdom argument made no such claim.

In this kind of situation it seems to me that the Court is, according to the Charter, to act always as the "principal judicial organ of the United Nations". In short, the Court must administer and apply the law. This entails taking account of the applicable United Nations law; and that includes taking fully into account Articles 24, 25, 28, 39, 48 and 103 of the United Nations Charter. This must involve declaring, interpreting, applying and protecting the law of the United Nations as laid down in no uncertain terms by the Charter.

When, therefore, as in the present case, the Security Council, exercising the discretionary competence given to it by Article 39 of the Charter, has decided that there exists a "threat to the peace", it is not for the principal judicial organ of the United Nations to question that decision, much less to substitute a decision of its own, but to state the plain meaning and intention of Article 39, and to *protect* the Security Council's exercise of that body's power and duty conferred upon it by the law; and to protect the exercise of the discretion of the Security Council to "decide what measures not involving the use of armed force are to be employed to give effect to its decisions".

Furthermore, when the Security Council moved into its powers under Chapter VII of the Charter, it "decided certain issues pertaining to the Lockerbie disaster with binding force" (*Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom, I.C.J. Reports 1992*, p. 26, separate opinion of Judge Lachs). There can be no doubt about that, for Article 25 of the Charter so provides. Moreover this competence is reasonable and necessary for the body that has been given "primary responsibility for the maintenance of international peace and security" (Art. 24); and this precisely "to ensure prompt and effective action by the United Nations".

There has been some talk amongst the commentators of the possibilities of some kind of power of "judicial review" by the International Court of Justice, though it should be borne in mind that the Court itself denied the possession of such powers in the *Namibia* case (*Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971*, at p. 45, para. 89). Undoubtedly there are many difficult and as yet unresolved juridical questions that are bound to arise when organs such as this Court and other organs of the United Nations find themselves called upon to perform what have usefully been called "parallel functions" (see Judge Skubiszewski's illuminating article on "The International Court of Justice and the Security Council" in *Fifty Years of the International Court of Justice* (1996), at p. 606).

That there is no power of judicial review of Security Council decisions under Chapter VII of the Charter is not merely because of the dictum of the Court in the *Namibia* case. The position is established by the provisions of the Charter itself. Moreover it is evident from the records of San Francisco that a power of judicial review was proposed and rejected by the drafting conference. The Court is not a revising body, it may not substitute its own discretion for that of the Security Council; nor would it in my view be a suitable body for doing that; nor is the forensic adversarial system suited to the making of political decisions.

The legal position is therefore to my mind very clear. The function of the principal judicial organ of the United Nations is to apply the law laid down in the Charter of the United Nations. The Security Council is given primary responsibility for the maintenance of the peace: its decisions under Chapter VII are binding decisions, and all Members of the United Nations have agreed to carry them out; and Article 103 provides that obligations under the Charter shall prevail in the event of a "conflict" between those obligations.

The law of the Charter is the law which the Court should, above all, respect and apply in this case. The Court should not allow itself to be persuaded otherwise by skilled and worldly-wise advocacy, which seems to have been remarkably successful in persuading the Court to forget the cardinal fact that this is a case where the applicant Government is alleged to be implicated in the terrorist act, and that this is a situation with which the Montreal Convention does not even purport to deal.

* *

But a problem remains. Very many of these matters which arise in relation to the question of admissibility are also highly relevant to the merits. In fact, as already mentioned above, most if not all of them will certainly appear again at some length in the arguments at the merits stage. Accordingly, quite apart from the difficulties arising from the infelicities of the drafting of Article 79, paragraph 7, of the Rules, is there not something to be said for leaving all these matters raised under admissibility to be dealt with at the merits stage, as the majority of the Court has indeed decided?

In my opinion it would have been right for the Court to have disposed of all these questions at this preliminary stage. The first reason is that, as has been pointed out above, the relevant law to be applied is beyond doubt; and the truth is that the Court has now already heard all these questions argued by the applicant Government at considerable length in 1992 as well as in the two weeks of hearings in the present phase. The main reason, however, which I consider of great theoretical and practical importance, I can best express by quoting from the separate opinion of

Judge Lachs in the Court's Order of 14 April 1992 (see *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United Kingdom, I.C.J. Reports 1992*, at p. 26). There, speaking of the "issues of concurrent jurisdiction as between the Court and a fellow main organ of the United Nations", he continued:

> "In fact the Court is the guardian of legality for the international community as a whole, both within and without the United Nations. One may therefore legitimately suppose that the intention of the founders was not to encourage a blinkered parallelism of functions but a fruitful interaction."

There might be thought to be room for the view that the permitting by the Court of what promises to be six or seven years of litigation, in three separate phases, over the legal effect of resolutions of the Security Council made under Chapter VII of the Charter, is something short of a "fruitful interaction".

Moreover, one must also think of the effect of this decision on other possible cases. There are other multilateral conventions besides Montreal, which might lend themselves to hobbling litigation about United Nations action to maintain or restore the peace. Nor indeed need the risk be confined to multilateral conventions. One thinks of the dangers to United Nations sanctions measures from the possible use of treaties of Friendship and Commerce and their jurisdiction clauses, once the meaning and effect of Article 103 of the Charter is called in question. The decision of the Court in the present case, provides a *vade mecum* and precedent for those who might wish to delay United Nations action by a miasma of legalistic activity. There are other conventions, besides the Montreal Convention, that might lend themselves in other and future circumstances, to similar legalistic, and politically profitable employment to frustrate the Security Council in the performance of its Charter functions; and it should be remembered that the Security Council may, in certain circumstances, have to act very quickly. This possibility was of course foreseen by the drafters of the Charter when they drafted Article 103 with these possibilities in mind.

For all these reasons, I am of the view that the Court, given that it has been persuaded that it has jurisdiction, ought certainly to have found this claim inadmissible. I regret exceedingly a decision which, seen in a general perspective and quite apart from the particular circumstances of the present case, seems to me to be an unwise one for the Court to have made.

(Signed) R. Y. JENNINGS.

JOINT DECLARATION OF JUDGES GUILLAUME AND FLEISCHHAUER

Article 79, paragraph 7, of the Rules of Court — Objection of mootness having an exclusively preliminary character

Actions of the United Kingdom in order to obtain the surrender of the suspects — Last substantive submission of Libya directed against these actions — Jurisdiction of the Court in this respect only to the extent that the actions in question would be contrary to the Montreal Convention

We feel prompted to make the following joint declaration with regard to the Judgment of today's date on the Preliminary Objections raised by the United Kingdom in the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*.

I.

We voted against the third conclusion in the *dispositif* that "the objection raised by the United Kingdom according to which Security Council resolutions 748 (1992) and 883 (1993) have rendered the claims of Libya without object does not, in the circumstances of the case, have an exclusively preliminary character". We find that that conclusion is wrong and that it sets a potentially dangerous precedent as it undercuts the object and purpose of Article 79 of the Rules of Court.

The conclusion is wrong for the following reasons.

This case is about the Montreal Convention. What is in dispute between the Parties is the applicability of the Convention to the Lockerbie incident and the observation of the obligations flowing from its provisions in the aftermath of the incident. The case is not about the Security Council resolutions 748 (1992) and 883 (1993) which were adopted by the Council on 31 March 1992 and 11 November 1993 respectively, i.e., after Libya had submitted its Application on 3 March 1992. Libya's substantive submissions as contained in its Application and its Memorial concern the applicability of the Montreal Convention and the compliance of the Parties with particular provisions of that instrument in the handling of the Lockerbie incident. Were it otherwise, the Court would not have jurisdiction; the only base for jurisdiction in this matter is Article 14, paragraph 1, of the Montreal Convention which confers on the Court jurisdiction over "any dispute between two or more Contracting States concerning the interpretation or application" of the Convention.

The United Kingdom as Respondent claims, as a matter of preliminary objection, "that the intervening resolutions of the Security Council have rendered the Libyan claims without object" (Judgment, para. 46). The aim of the objection is to obtain a decision from the Court that there is no ground for proceeding to judgment on the merits. This is an exclusively preliminary objection. The Court could — and should — have decided on it without thereby passing judgment — if only in part — on the merits of Libya's claims.

Had the Court rejected — in whole or in part — the Preliminary Objection in question, then it would now turn — in so far as the Preliminary Objection was rejected — to the merits of the Libyan submissions and examine them one by one within the limits of its jurisdiction. The outcome of that examination would in no way be predetermined by the previous examination of and decision on the objection of the United Kingdom.

Had the Court, on the other hand, accepted the objection raised by the United Kingdom, then the Court would have effectively ended the case. It would, however, have done so without deciding on the merits of any of the submissions presented by Libya or predetermining them. The Court would have left the Montreal Convention completely aside. It would have based its decision exclusively on a new element, extraneous to the Montreal Convention and not related to it — the Security Council resolutions. In adopting resolutions 748 and 883, which contain decisions made under Chapter VII of the Charter and binding under Article 25, the Security Council has not taken position with regard to the Montreal Convention; in no way has it decided whether the provisions of the Convention are applicable to the Lockerbie incident, nor has it decided or taken position on the question as to whether the provisions of the Convention have been complied with by the Parties. Rather, in the exercise of its primary responsibility for the maintenance of international peace and security, the Council found it necessary to impose certain obligations on Libya. In accordance with Article 103 of the Charter, those obligations override all other obligations of the Parties, irrespective of whether the latter obligations were contested between the Parties or whether they had been complied with or not. The lack of connection between the Security Council resolutions and the position of the Parties under the Montreal Convention precludes the evaluation of the objection of the United Kingdom as a defence on the merits; it also prohibits to state, as the Court does, that the objection "does much more than 'touch[ing] upon subjects belonging to the merits of the case'" (Judgment, para. 50) or that it is "'inextricably interwoven' with the merits" *(ibid.)*.

Because this is so, the third conclusion of the *dispositif* of the Judgment seems to run counter to the jurisprudence of the Court concerning the application of Article 79 of the Rules of Court since their 1972 revision. The Court, with one exception (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Preliminary Objections*, 26 November 1984, *I.C.J. Reports 1984*, p. 392), has always dealt with preliminary objections in the first phase of the proceedings and has indeed favoured a restrictive interpretation of the notion "not exclusively preliminary" in the interest of speedy and economical disposal of the objections (*ibid.*, *Merits*, 27 June 1986, *I.C.J. Reports 1986*, pp. 29 ff.).

The Judgment seeks to justify its third conclusion by declaring that accepting the Preliminary Objection of the United Kingdom would have meant taking "a decision establishing that the rights claimed by Libya under the Montreal Convention are incompatible with its obligations under the Security Council resolutions" (Judgment, para. 50). It adds that acceptance of the objection raised by the Respondent would have constituted "a decision that those obligations prevail over those rights by virtue of Articles 25 and 103 of the Charter" *(ibid.)*. This might be true, but it is beside the point for the decision to be taken now on the Preliminary Objection of the United Kingdom. Defining the meaning and the effect of the resolutions of the Council and comparing those resolutions with the submissions of Libya regarding the Montreal Convention in no way means taking position on the rights and obligations of Libya under the Convention.

That acceptance of the Preliminary Objection of the United Kingdom would have brought the case to an end is also not an argument against its exclusively preliminary character: the ending of a case is the intention of every preliminary objection. This is so in the case of objections of the kind of those dealt with in the third conclusion of the *dispositif*. The Court has in the past had occasion to deal with such objections and has considered them separate from the merits; it dealt with them even before turning to jurisdiction and admissibility (*Nuclear Tests* cases *(Australia* v. *France)*, 20 December 1974, *I.C.J. Reports 1974*, pp. 259 and 272 and *(New Zealand* v. *France)*, 20 December 1974, *I.C.J. Reports 1974*, pp. 457 and 478). In this connection it has also to be pointed out that if the Council terminated, with effect *ex nunc*, the measures prescribed by resolutions 748 and 883, the position of the Parties under the Convention would still exist, unchanged.

The third conclusion of the *dispositif* runs counter to the object and purpose of Article 79 of the Rules of Court and sets a dangerous precedent for the future handling of that provision for the following reasons.

When the Court, in 1972, adopted the text which later became Article 79, it did so for reasons of procedural economy and of sound administration of justice. Court and parties were called upon to clear away preliminary questions of jurisdiction and admissibility as well as other preliminary objections before entering into lengthy and costly proceedings on the merits of a case. Of course, provision had to be made for objections that did not possess "in the circumstances of the case, an exclusively preliminary character" (Art. 79, para. 7). In order to make the necessary determinations the Court, "whenever necessary, may request the parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue" (Art. 79, para. 6). The interpretation given by the Court in the present case to the notion "not exclusively preliminary character" is, however, so wide and so vague that the possibility of accepting a preliminary objection becomes seriously restricted. Thereby the Judgment acts counter to the procedural economy and the sound administration of justice which it is the intent of Article 79 to achieve.

II.

We would also like to state that we have voted in favour of the first conclusion of the *dispositif* on jurisdiction of the Court over the case on the following understanding relating to the last of the substantive submissions presented by Libya in its Application and its Memorial.

In the version submitted to the Court in the Libyan Memorial this submission concerns an alleged legal obligation of the United Kingdom

> "to respect Libya's right not to have the [Montreal] Convention set aside by means which would in any case be at variance with the principles of the United Nations Charter and with the mandatory rules of general international law prohibiting the use of force and the violation of the sovereignty, territorial integrity, sovereign equality and political independence of States" (Judgment, para. 34).

We recognize that there is a legal dispute between the Parties concerning this point. That dispute, however, falls under Article 14, paragraph 1, of the Montreal Convention and therefore within the jurisdiction of the Court only if, and in so far as, it concerns the interpretation and application of one or more of the provisions of the Convention. The dispute does not fall under Article 14, paragraph 1, and the jurisdiction of the Court if it concerns the interpretation and application of Article 2, paragraph 4, of the Charter of the United Nations. That is spelled out in paragraph 36 of the Judgment, but not so explicitly in the *dispositif*: that is why we wish to make our position on the matter quite clear.

INTERNATIONAL COURT OF JUSTICE

27 February 1998

CASE CONCERNING QUESTIONS OF INTERPRETATION AND APPLICATION OF THE 1971 MONTREAL CONVENTION ARISING FROM THE AERIAL INCIDENT AT LOCKERBIE

(LIBYAN ARAB JAMAHIRIYA *v.* UNITED STATES OF AMERICA)

PRELIMINARY OBJECTIONS

Objection to jurisdiction — Montreal Convention of 23 September 1971 — Treaty in force between the Parties — Article 14, paragraph 1, of the Convention.

Grounds for lack of jurisdiction invoked in the provisional measures phase — Arguments repeated in passing in the present phase of the proceedings — Negotiations — Request for arbitration — Six-month period before the Court can be seised.

Contention that no legal dispute exists concerning the interpretation and application of the Montreal Convention — Dispute of a general nature as to the legal régime applicable to the destruction of the Pan Am aircraft over Lockerbie — Specific disputes concerning the interpretation and application of Article 7 of the Convention, read in conjunction with Articles 1, 5, 6 and 8, and the interpretation and application of Article 11 of the Convention.

Contention that it is not for the Court to decide on the lawfulness of actions instituted by the Respondent to secure the surrender of the two alleged offenders — Jurisdiction of the Court to decide on the lawfulness of those actions in so far as they would be at variance with the provisions of the Montreal Convention.

Security Council resolutions 748 (1992) and 883 (1993) — Adoption after filing of the Application — Jurisdiction to be determined at the date of filing of the Application.

Objection to admissibility — Contention that the dispute between the Parties is governed by Security Council resolutions 748 (1992) and 883 (1993) and not the Montreal Convention — Admissibility to be determined at the date of filing of the Application — Adoption of the resolutions after the filing of the Application.

Objection that there is no ground for proceeding to judgment on the merits — Contention that the Applicant's claims have become moot because Security Council resolutions 748 (1992) and 883 (1993) have rendered them without object — Article 79, paragraph 1, of the Rules of Court — "Preliminary" Objection — Formal conditions for presentation — Article 79, paragraph 7, of the Rules of Court — 1972 Revision — Objection which is "not exclusively" preliminary containing "both preliminary aspects and other aspects relating to the merits" — Rights on the merits constituting the very subject-matter of a decision on the objection.

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Request submitted in the alternative that the Court should "resolve the case in substance now" — By raising preliminary objections, the Respondent has made a procedural choice the effect of which, according to the express terms of Article 79, paragraph 3, is to suspend the proceedings on the merits.

Fixing of time-limits for the further proceedings.

JUDGMENT

Present: *Vice-President* **WEERAMANTRY,** *Acting President; President* **SCHWEBEL;** *Judges* **ODA, BEDJAOUI, GUILLAUME, RANJEVA, HERCZEGH, SHI, FLEISCHHAUER, KOROMA, VERESHCHETIN, PARRA-ARANGUREN, KOOIJMANS, REZEK;**

Judge ad hoc EL-KOSHERI; *Registrar* **VALENCIA-OSPINA.**

In the case concerning questions of interpretation and application of the 1971 Montreal Convention arising from the aerial incident at Lockerbie,

between

the Great Socialist People's Libyan Arab Jamahiriya,

represented by

H.E. Mr. Hamed Ahmed Elhouderi, Ambassador, Secretary of the People's Office of the Great Socialist People's Libyan Arab Jamahiriya to the Netherlands,

as Agent;

Mr. Mohamed A. Aljady,
Mr. Abdulhamid Raeid,

as Counsel;

Mr. Abdelrazeg El-Murtadi Suleiman, Professor of Public International Law, Faculty of Law, University of Benghazi,
Mr. Ian Brownlie, C.B.E., Q.C., F.B.A., Chichele Professor of Public International Law, University of Oxford,
Mr. Jean Salmon, Professor of Law emeritus, Université libre de Bruxelles,
Mr. Eric Suy, Professor of International Law, Catholic University of Louvain (K.U. Leuven),
Mr. Eric David, Professor of Law, Université libre de Bruxelles,

as Counsel and Advocates;

Mr. Nicolas Angelet, Principal Assistant, Faculty of Law, Catholic University of

/...

Louvain (K.U. Leuven),
Mrs. Barbara Delcourt, Assistant, Faculty of Social, Political and Economic Sciences,
Université libre de Bruxelles; Research Fellow, Centre of International Law and Institute of European Studies, Université libre de Bruxelles,
Mr. Mohamed Awad,

as Advisers.

and

the United States of America,

represented by

Mr. David R. Andrews, Legal Adviser, United States Department of State,

as Agent;

Mr. Michael J. Matheson, Principal Deputy Legal Adviser, United States Department of State,

as Co-Agent;

Mr. John R. Crook, Assistant Legal Adviser, United States Department of State,
Mr. Sean D. Murphy, Counsellor for Legal Affairs, United States Embassy, The Hague,
Mr. Oscar Schachter, Professor at the Columbia University School of Law,
Ms Elisabeth Zoller, Professor at the University of Paris II,

as Counsel and Advocates;

Mr. John J. Kim, Office of the Legal Adviser, United States Department of State,
Mr. Brian Murtagh, United States Department of Justice,

as Counsel.

THE COURT,

composed as above,

after deliberation,

delivers the following Judgment:

1. On 3 March 1992, the Government of the Great Socialist People's Libyan Arab Jamahiriya (hereinafter called "Libya") filed in the Registry of the Court an Application instituting proceedings against the Government of the United States of America (hereinafter called "the United States") in respect of a "dispute between Libya and the United States concerning the interpretation or application of the Montreal Convention" of 23 September 1971 for the Suppression of Unlawful Acts against the Safety of Civil Aviation (hereinafter called "the Montreal

Convention"). The Application referred to the destruction, on 21 December 1988, over Lockerbie (Scotland), of the aircraft on Pan Am flight 103, and to charges brought by a Grand Jury of the United States in November 1991 against two Libyan nationals suspected of having caused a bomb to be placed aboard the aircraft, which bomb had exploded causing the aeroplane to crash. The Application invoked as the basis for jurisdiction Article 14, paragraph 1, of the Montreal Convention.

2. Pursuant to Article 40, paragraph 2, of the Statute, the Application was immediately communicated to the Government of the United States by the Registrar; pursuant to paragraph 3 of that Article, all States entitled to appear before the Court were notified of the Application.

3. Pursuant to Article 69, paragraph 3, of the Rules of Court, the Registrar addressed to the Secretary General of the International Civil Aviation Organization the notification provided for in Article 34, paragraph 3, of the Statute.

Pursuant to Article 43 of the Rules of Court, the Registrar also addressed the notification provided for in Article 63, paragraph 1, of the Statute to all those States which, on the basis of information obtained from the depositary Governments, appeared to be parties to the Montreal Convention.

4. Since the Court included upon the Bench no judge of Libyan nationality, Libya exercised its right under Article 31, paragraph 2, of the Statute to choose a judge *ad hoc* to sit in the case: it chose Mr. Ahmed Sadek El-Kosheri to do so.

5. On 3 March 1992, immediately after the filing of its Application, Libya submitted a request for the indication of provisional measures under Article 41 of the Statute.

By an Order dated 14 April 1992, the Court, after hearing the Parties, found that the circumstances of the case were not such as to require the exercise of its power to indicate provisional measures.

6. By an order of 19 June 1992, the Court, having regard to the requests of the Parties, fixed 20 December 1993 as the time-limit for the filing by Libya of a Memorial and 20 June 1995 as the time-limit for the filing by the United States of a Counter-Memorial.

Libya duly filed its Memorial within the prescribed time-limit.

7. Within the time-limit fixed for the filing of its Counter-Memorial, the United States filed Preliminary Objections to the jurisdiction of the Court and the admissibility of the Application.

Accordingly, by an Order of 22 September 1995, the Court, noting that by virtue of Article 79, paragraph 3, of the Rules of Court the proceedings on the merits were suspended, fixed 22 December 1995 as the time-limit within which Libya might present a written statement of its observations and submissions on the Preliminary Objections.

Libya filed such a statement within the time-limit so fixed, and the case became ready for hearing in respect of the Preliminary Objections.

8. By a letter dated 19 February 1996, the Registrar, pursuant to Article 34, paragraph 3, of the Statute, communicated copies of the written pleadings to the Secretary General of the International Civil Aviation Organization and, referring to Article 69, paragraph 2, of the Rules of Court, specified that, if the Organization wished to present written observations to the Court they should be limited, at that stage, to questions of jurisdiction and admissibility.

By a letter of 26 June 1996, the Secretary General of the International Civil Aviation Organization informed the Court that the Organization "ha[d] no observations to make for the moment" but wished to remain informed about the progress of the case, in order to be able to determine whether it would be appropriate to submit observations later.

9. The President of the Court, being a national of one of the Parties to the case, was unable, by virtue of Article 32, paragraph 1, of the Rules of Court, to exercise the functions of the presidency in respect of the present case. It therefore fell to the Vice-President, in accordance with Article 13, paragraph 1, of the Rules of Court, to exercise the functions of the presidency in the case.

10. In accordance with Article 53, paragraph 2, of its Rules, the Court decided to make accessible to the public, on the opening of the oral proceedings, the Preliminary Objections of the United States and the written statement containing the observations and submissions of Libya on the Objections, as well as the documents annexed to those pleadings.

11. Public sittings were held between 13 and 22 October 1997, at which the Court heard the oral arguments and replies of:

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For the United States:	Mr. David Andrews, Mr. Sean D. Murphy, Mr. John R. Crook, Mr. Oscar Schachter, Ms Elizabeth Zoller, Mr. Michael J. Matheson.
For Libya:	H.E. Mr. Hamed Ahmed Elhouderi, Mr. Abdelrazeg El-Murtadi Suleiman, Mr. Jean Salmon, Mr. Eric David, Mr. Eric Suy, Mr. Ian Brownlie.

At the hearings, Members of the Court put questions to the Parties, who answered in writing after the close of the oral proceedings.

*

12. In the Application, the following requests were made by Libya:

> "Accordingly, while reserving the right to supplement and amend this submission as appropriate in the course of further proceedings, Libya requests the Court to adjudge and declare as follows:
>
> *(a)* that Libya has fully complied with all of its obligations under the Montreal Convention;
>
> *(b)* that the United States has breached, and is continuing to breach, its legal obligations to Libya under Articles 5 (2), 5 (3), 7, 8 (2) and 11 of the Montreal Convention; and
>
> *(c)* that the United States is under a legal obligation immediately to cease and desist from such breaches and from the use of any and all force or threats against Libya, including the threat of force against Libya, and from all violations of the sovereignty, territorial integrity, and the political independence of Libya."

13. In the written proceedings, the following submissions were presented by the Parties:

On behalf of the Government of Libya,

in the Memorial:

> "For these reasons, while reserving the right to supplement and amend these submissions as appropriate in the course of further proceedings, Libya requests the Court to adjudge and declare as follows:
>
> *(a)* that the Montreal Convention is applicable to this dispute;
>
> *(b)* that Libya has fully complied with all of its obligations under the Montreal Convention and is justified in exercising the criminal jurisdiction provided for by that Convention;
>
> *(c)* that the United States has breached, and is continuing to breach, its legal obligations to Libya under Article 5, paragraphs 2 and 3, Article 7, Article 8, paragraph 3, and Article 11 of the Montreal Convention;
>
> *(d)* that the United States is under a legal obligation to respect Libya's right not to have the Convention set aside by means which would in any case be at variance with the principles of the United Nations Charter and with the

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> mandatory rules of general international law prohibiting the use of force and the violation of the sovereignty, territorial integrity, sovereign equality and political independence of States."

On behalf of the Government of the United States,

in the Preliminary Objections

> "The United States of America requests that the Court uphold the objections of the United States to the jurisdiction of the Court and decline to entertain the case."

On behalf of the Government of Libya,

in the written statement of its observations and submissions on the Preliminary Objections:

> "For these reasons, and reserving the right to complement or modify the present submissions in the course of the proceedings if necessary, Libya requests the Court to adjudge and declare:
>
> — that the preliminary objections raised by the United States must be rejected and that, as a consequence:
>
> *(a)* the Court has jurisdiction to entertain the Application of Libya,
>
> *(b)* that the Application is admissible;
>
> — that the Court should proceed to the merits."

14. In the oral proceedings, the following submissions were presented by the Parties:

On behalf of the Government of the United States,

at the hearing on 20 October 1997:

> "The United States of America requests that the Court uphold the objections of the United States to the jurisdiction of the Court and decline to entertain the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie (Libyan Arab Jamahiriya* v. *United States of America)*."

On behalf of the Government of Libya:

at the hearing on 22 October 1997:

> "The Libyan Arab Jamahiriya requests the Court to adjudge and declare:
>
> — that the Preliminary Objections raised by . . . the United States must be rejected and that, as a consequence:
>
> *(a)* the Court has jurisdiction to entertain the Application of Libya,
>
> *(b)* that the Application is admissible;
>
> — that the Court should proceed to the merits."

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15. In its most recent arguments in the present case, the United States raised three objections: the first to the Court's jurisdiction, the second to the admissibility of the Application and the third alleging that the Libyan claims had become moot as having been rendered without object. For the United States, each of these objections is "genuinely preliminary in character". The United States contended moreover, in the alternative, that, should the Court nonetheless hold that it had jurisdiction and decide to exercise that jurisdiction, it could and should "resolve the case in substance now" by deciding, as a preliminary matter, that the relief sought by Libya is precluded.

*

* *

16. The Court will first consider the objection raised by the United States to its jurisdiction.

17. Libya submits that the Court has jurisdiction on the basis of Article 14, paragraph 1, of the Montreal Convention, which provides that:

> "Any dispute between two or more Contracting States concerning the interpretation or application of this Convention which cannot be settled through negotiation, shall, at the request of one of them, be submitted to arbitration. If within six months from the date of the request for arbitration the Parties are unable to agree on the organization of the arbitration, any one of those Parties may refer the dispute to the International Court of Justice by request in conformity with the Statute of the Court."

18. The Parties agree that the Montreal Convention is in force between them and that it was already in force both at the time of the destruction of the Pan Am aircraft over Lockerbie, on 21 December 1988, and at the time of filing of the Application, on 3 March 1992. However, the Respondent contests the jurisdiction of the Court because, in its submission, all the requisites laid down in Article 14, paragraph 1, of the Montreal Convention have not been complied with in the present case.

* *

19. The United States contests the jurisdiction of the Court mainly on the basis of Libya's failure to show, firstly, that there exists a legal dispute between the Parties, and, secondly, that such dispute, if any, concerns the interpretation or application of the Montreal Convention and falls as a result within the terms of Article 14, paragraph 1, of that Convention.

However, at the hearings, the United States also made reference, in passing, to the arguments it had advanced, in the provisional measures phase of the proceedings, as to whether the dispute that, in the opinion of Libya, exists between the Parties could be settled by negotiation, whether Libya had made a proper request for arbitration and whether it had respected the six-month period required by Article 14, paragraph 1, of the Convention.

20. The Court observes that in the present case, the Respondent has always maintained that the destruction of the Pan Am aircraft over Lockerbie did not give rise to any dispute between the Parties regarding the interpretation or application of the Montreal Convention and that, for that reason, in the Respondent's view, there was nothing to be settled by negotiation under the Convention; the Court notes that the arbitration proposal contained in the letter sent on 18 January 1992 by the Libyan Secretary of the People's Committee for Foreign Liaison and International Cooperation to the Secretary of State of the United States met with no answer; and it notes, in particular, that the Respondent clearly expressed its intention not to accept arbitration — in whatever form — when presenting and strongly supporting resolution 731 (1992) adopted by the Security Council three days later, on 21 January 1992.

Consequently, in the opinion of the Court the alleged dispute between the Parties could not be settled by negotiation or submitted to arbitration under the Montreal Convention, and the refusal of the Respondent to enter into arbitration to resolve that dispute absolved Libya from any obligation under Article 14, paragraph 1, of the Convention to observe a six-month period starting from the request for arbitration, before seising the Court.

* *

21. As recalled by the Parties, the Permanent Court of International Justice stated in 1924 that "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons" (*Mavrommatis Palestine Concessions, 1924, P.C.I.J., Series A, No. 2*, p. 11). The present Court for its part, in its Judgment of 30 June 1995 in the case concerning *East Timor (Portugal* v. *Australia)* emphasized the following:

> "In order to establish the existence of a dispute, 'It must be shown that the claim of one party is positively opposed by the other' (*South West Africa, Preliminary Objections, Judgment, I.C.J. Reports 1962*, p. 328; and further, 'Whether there exists an international dispute is a matter for objective determination' (*Interpretation of Peace Treaties with Bulgaria, Hungary and Romania, First Phase, Advisory Opinion,*

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I.C.J. Reports 1950, p. 74)." (*I.C.J. Reports 1995*, p. 100.)

*

22. In its Application and Memorial, Libya maintained that the Montreal Convention was the only instrument applicable to the destruction of the Pan Am aircraft over Lockerbie, for the following reasons:

> *(a)* the Respondent and Libya are bound by the Montreal Convention which is in force between the Parties;
>
> *(b)* the Montreal Convention is specifically aimed at preventing that type of action (third paragraph of the Preamble);
>
> *(c)* the actions ascribed to the Libyan nationals are covered by Article 1 of the Montreal Convention;
>
> *(d)* "the system of the Montreal Convention, as compared to the system of the Charter, is both a *lex posterior* and a *lex specialis*; [consequently,] for matters covered by that Convention, it must *a priori* take precedence over the systems for which the Charter provides"; and
>
> *(e)* there is no other convention concerning international criminal law in force which is applicable to these issues in the relations between Libya and the United States.

23. The United States does not deny that, as such, the facts of the case could fall within the terms of the Montreal Convention. However, it emphasizes that, in the present case, from the time Libya invoked the Montreal Convention, the United States has claimed that it was not relevant because it was not a question of "bilateral differences" but one of "a threat to international peace and security resulting from State-sponsored terrorism".

24. Consequently, the Parties differ on the question whether the destruction of the Pan Am aircraft over Lockerbie is governed by the Montreal Convention. A dispute thus exists between the Parties as to the legal régime applicable to this event. Such a dispute, in the view of the Court, concerns the interpretation and application of the Montreal Convention, and, in accordance with Article 14, paragraph 1, of the Convention, falls to be decided by the Court.

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25. Furthermore, in its Application and Memorial, Libya stressed the following six points, in particular in support of the submissions set forth, respectively, in paragraph 12 (subparagraphs *(a)* and *(b)*) and paragraph 13 (subparagraphs *(b)* and *(c)*), above:

> *(a)* the actions which brought about the destruction of the Pan Am aircraft over Lockerbie constitute one of the offences covered by Article 1 of the Montreal Convention and therefore the Montreal Convention must be applied to those facts;
>
> *(b)* Libya has complied with the obligation imposed by Article 5, paragraph 2, of the Montreal Convention of establishing its jurisdiction over the alleged offenders in the destruction of the aircraft, and it has the right to exercise the jurisdiction so established;
>
> *(c)* Libya has exercised its jurisdiction over the two alleged offenders on the basis of its Penal Code, and the Respondent should not interfere with the exercise of that jurisdiction;
>
> *(d)* Libya has exercised the rights conferred by Article 6 of the Montreal Convention by taking all necessary measures to ensure the presence of the two alleged offenders, making preliminary enquiries, notifying the States concerned and indicating that it intended to exercise jurisdiction, but according to Libya the Respondent, by its actions and threats, is attempting, according to Libya, to prevent the application of the Convention;
>
> *(e)* Libya having decided not to extradite the two alleged offenders, Article 7 of the Montreal Convention gives it the right to submit them to its competent authorities for the purpose of prosecution in accordance

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with Libyan law; and

(f) on the basis of Article 8, paragraph 3, of the Montreal Convention, it has the right not to extradite the two alleged offenders because they are Libyan nationals and the Libyan Constitution does not permit their extradition.

26. The Respondent disputes that the Montreal Convention confers on Libya the rights it claims to enjoy. It contends, moreover, that none of the provisions referred to by Libya imposes obligations on the United States. Finally, it recalls that it never itself invoked the Montreal Convention, and observes that nothing in that Convention prevented it from requesting the surrender of the two alleged offenders outside the framework of the Convention.

27. Article 1 of the Montreal Convention provides as follows:

"***Article 1***

1. Any person commits an offence if he unlawfully and intentionally:

(a) performs an act of violence against a person on board an aircraft in flight if that act is likely to endanger the safety of that aircraft; or

(b) destroys an aircraft in service or causes damage to such an aircraft which renders it incapable of flight or which is likely to endanger its safety in flight; or

(c) places or causes to be placed on an aircraft in service, by any means whatsoever, a device or substance which is likely to destroy that aircraft, or to cause damage to it which renders it incapable of flight, or to cause damage to it which is likely to endanger its safety in flight; or

(d) destroys or damages air navigation facilities or interferes with their operation, if any such act is likely to endanger the safety of aircraft in flight; or

(e) communicates information which he knows to be false, thereby endangering the safety of an aircraft in flight.

2. Any person also commits an offence if he:

(a) attempts to commit any of the offences mentioned in paragraph 1 of this Article; or

(b) is an accomplice of a person who commits or attempts to commit any such offence."

Article 5 provides:

"*Article 5*

1. Each Contracting State shall take such measures as may be necessary to establish its jurisdiction over the offences in the following cases:

(a) when the offence is committed in the territory of that State;

(b) when the offence is committed against or on board an aircraft registered in that State;

(c) when the aircraft on board which the offence is committed lands in its territory with the alleged offender still on board;

(d) when the offence is committed against or on board an aircraft leased without crew to a lessee who has his principal place of business or, if the lessee has no such place of business, his permanent residence, in that State.

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> 2. Each Contracting State shall likewise take such measures as may be necessary to establish its jurisdiction over the offences mentioned in Article 1, paragraph 1 *(a)*, *(b)* and *(c)*, and in Article 1, paragraph 2, in so far as that paragraph relates to those offences, in the case where the alleged offender is present in its territory and it does not extradite him pursuant to Article 8 to any of the States mentioned in paragraph 1 of this Article.
>
> 3. This Convention does not exclude any criminal jurisdiction exercised in accordance with national law."

Article 6, for its part, states:

> "*Article 6*
>
> 1. Upon being satisfied that the circumstances so warrant, any Contracting State in the territory of which the offender or the alleged offender is present, shall take him into custody or take other measures to ensure his presence. The custody and other measures shall be as provided in the law of that State but may only be continued for such time as is necessary to enable any criminal or extradition proceedings to be instituted.
>
> 2. Such State shall immediately make a preliminary enquiry into the facts.
>
> 3. Any person in custody pursuant to paragraph 1 of this Article shall be assisted in communicating immediately with the nearest appropriate representative of the State of which he is a national.
>
> 4. When a State, pursuant to this Article, has taken a person into custody, it shall immediately notify the States mentioned in Article 5, paragraph 1, the State of nationality of the detained person and, if it considers it advisable, any other interested State of the fact that such person is in custody and of the circumstances which warrant his detention. The State which makes the preliminary enquiry contemplated in paragraph 2 of this Article shall promptly report its findings to the said States and shall indicate whether it intends to exercise jurisdiction."

Article 7 is worded in the following terms:

> "*Article 7*
>
> The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed in its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."

Finally, in the words of Article 8:

> "*Article 8*
>
> 1. The offences shall be deemed to be included as extraditable offences in any extradition treaty existing between Contracting States. Contracting States undertake to include the offences as extraditable offences in every extradition treaty to be concluded between them.
>
> 2. If a Contracting State which makes extradition conditional on the existence of a treaty receives a request for extradition from another Contracting State with which it has no extradition treaty, it may at its option consider this Convention as the legal basis for extradition in respect of the offences. Extradition shall be subject to the other conditions provided by the law of the requested State.
>
> 3. Contracting States which do not make extradition conditional on the existence of a treaty shall recognize the offences as extraditable offences between themselves subject to the conditions provided by the law of the requested State.
>
> 4. Each of the offences shall be treated, for the purpose of extradition between Contracting States, as if it had been committed not only in the place in which it occurred but also in the territories of the States required to establish their jurisdiction in accordance with Article 5, paragraph 1 *(b)*, *(c)* and *(d)*."

28. In view of the positions put forward by the Parties, the Court finds that there exists between them not only a dispute of a general nature, as defined in paragraph 24 above, but also a specific dispute which concerns the interpretation and application of Article 7 — read in conjunction with Article 1, Article 5, Article 6 and Article 8 — of the Montreal Convention, and which, in accordance with Article 14, paragraph 1, of the Convention, falls to be decided by the Court.

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29. Moreover, Libya maintained in its Application and Memorial that, once it had commenced its judicial investigation of the two alleged offenders, the Respondent was, according to Article 11, paragraph 1, of the Montreal Convention, under an obligation to hand over to the Libyan authorities all the evidence in its possession regarding the offence. In Libya's opinion, this obligation was not duly complied with, because the United States "has supplied *no* information".

30. In this regard, the United States acknowledges that "Article 11 is the only provision, among those listed in Libya's complaint, that arguably addresses any obligation of any State other than Libya". However, it claims that "the obligation expressed in Article 11 is very general in nature" and that it had "satisfied [this] general obligation". It states in this connection that "on 21 November 1991, the United States transmitted to Libya through the authorities of the Government of Belgium copies of the grand jury indictment of the two Libyans". It also maintains that "Article 11 preserves the right of the United States, under United States law, to refuse to disclose additional details regarding the investigation, such as evidence derived from confidential sources". The United States, in addition, makes the following observation:

> "As a practical matter, it is difficult to see how the Court can define specific forms of additional assistance that must be provided under Article 11. For the Court to try to inject into Article 11 specificity as to the level of assistance that is required — such as the provision of witness statements or other information — would simply be unworkable and could inhibit co-operation in an area that the drafters of the Montreal Convention deliberately did not seek to regulate."

31. Article 11 of the Montreal Convention is worded as follows:

> "*Article 11*
>
> 1. Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences. The law of the State requested shall apply in all cases.
>
> 2. The provisions of paragraph 1 of this Article shall not affect obligations under any other treaty, bilateral or multilateral, which governs or will govern, in whole or in part, mutual assistance in criminal matters."

32. Having taken account of the positions of the Parties as to the duties imposed by Article 11 of the Montreal Convention, the Court concludes that there equally exists between them a dispute which concerns the interpretation and application of that provision, and which, in accordance with Article 14, paragraph 1, of the Convention, falls to be decided by the Court.

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33. Libya, in the latest version of its submissions, finally asks the Court to find that

> "the United States is under a legal obligation to respect Libya's right not to have the [Montreal] Convention set aside by means which would in any case be at variance with the principles of the United Nations Charter and with the mandatory rules of general international law prohibiting the use of force and the violation of the sovereignty, territorial integrity, sovereign equality and political independence of States".

34. The United States maintains that it is not for the Court, on the basis of Article 14, paragraph 1, of the Montreal Convention, to decide on the lawfulness of actions which are in any event in conformity with international law, and which were instituted by the Respondent to secure the surrender of the two alleged offenders. It concludes from this that the Court lacks jurisdiction to hear the submissions presented on this point by Libya.

35. The Court cannot uphold the line of argument thus formulated. Indeed, it is for the Court to decide, on the basis of Article 14, paragraph 1, of the Montreal Convention, on the lawfulness of the actions criticized by Libya, in so far as those actions would be contrary to the provisions of the Montreal Convention.

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36. In the present case, the United States has contended, however, that even if the Montreal Convention did confer on Libya the rights it claims, those rights could not be exercised in this case because they were superseded by Security Council resolutions 748 (1992) and 883 (1993) which, by virtue of Articles 25 and 103 of the United Nations Charter, have priority over all rights and obligations arising out of the Montreal Convention. The

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Respondent has also argued that, because of the adoption of those resolutions, the only dispute which existed from that point on was between Libya and the Security Council; this, clearly, would not be a dispute falling within the terms of Article 14, paragraph 1, of the Montreal Convention and thus not one which the Court could entertain.

37. The Court cannot uphold this line of argument. Security Council resolutions 748 (1992) and 883 (1993) were in fact adopted after the filing of the Application on 3 March 1992. In accordance with its established jurisprudence, if the Court had jurisdiction on that date, it continues to do so; the subsequent coming into existence of the above-mentioned resolutions cannot affect its jurisdiction once established (cf. *Nottebohm, Preliminary Objection, Judgment, I.C.J. Reports 1953*, p. 122; *Right of Passage over Indian Territory, Preliminary Objections, Judgment, I.C.J. Reports 1957*, p. 142).

* *

38. In the light of the foregoing, the Court concludes that the objection to jurisdiction raised by the United States on the basis of the alleged absence of a dispute between the Parties concerning the interpretation or application of the Montreal Convention must be rejected, and that the Court has jurisdiction to hear the disputes between Libya and the United States as to the interpretation or application of the provisions of that Convention.

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39. The Court will now turn to consider the objection of the United States according to which the Libyan Application is not admissible.

40. The United States emphasizes that the measures which Libya opposes are those taken by the Security Council under resolutions 731 (1992), 748 (1992) and 883 (1993):

> *(a)* determining that Libya's failure to respond fully and effectively to the requests that Libya surrender the two accused for trial in the United States or the United Kingdom constitutes a threat to international peace and security;
>
> *(b)* deciding that the Government of Libya must comply with those requests; and
>
> *(c)* imposing economic sanctions and other measures to compel Libya to comply with those requests.

According to the United States, by seising the Court, Libya was endeavouring to "undo the Council's actions". The United States argues that, even if Libya could make valid claims under the Montreal Convention, these are "superseded" by the relevant decisions of the Security Council under Chapter VII of the Charter, which impose different obligations. The said decisions thus establish the rules governing the dispute between Libya and the United States. Those rules — and not the Montreal Convention — define the obligations of the Parties; and the claims of Libya based on the Convention are therefore inadmissible. The United States further contends that if the Court should see fit to "assert [its] jurisdiction to examine on the merits, by way of objection, the validity of Security Council resolutions 731 (1992), 748 (1992) and 883 (1993), the Libyan Application should nonetheless be dismissed at the preliminary objections stage because it is not admissible".

41. For its part, Libya argues that it is clear from the actual terms of resolutions 731 (1992), 748 (1992) and 883 (1993) that the Security Council has never required it to surrender its nationals to the United States or the United Kingdom; it stated at the hearing that this remained "Libya's principal argument". It added that the Court must interpret those resolutions "in accordance with the Charter, which determined their validity", and that the Charter prohibited the Council from requiring Libya to hand over its nationals to the United States or the United Kingdom. Libya concludes that its Application is admissible "as the Court can usefully rule on the interpretation and application of the Montreal Convention ... independently of the legal effects of resolutions 748 (1992) and 883 (1993)".

Libya also observes that the arguments of the United States based on the provisions of the Charter raise problems which do not possess an exclusively preliminary character, but appertain to the merits of the dispute. It argues, in particular, that the question of the effect of the Security Council resolutions is not of an exclusively preliminary character, inasmuch as the resolutions under consideration are relied upon by the United States in order to overcome the application of the Montreal Convention, and since Libya is justified in disputing that these resolutions are opposable to it.

42. Libya furthermore draws the Court's attention to the principle that "[t]he critical date for determining the admissibility of an application is the date on which it is filed" (*Border and Transborder Armed Actions, (Nicaragua v. Honduras), Jurisdiction and Admissibility, I.C.J. Reports 1988*, p. 95, para. 66). It points out in this connection that its Application was filed on 3 March 1992, that Security Council resolutions 748 (1992) and

883 (1993) were adopted on 31 March 1992 and 11 November 1993, respectively; and that resolution 731 (1992) of 21 January 1992 was not adopted under Chapter VII of the United Nations Charter and was only a mere recommendation. Consequently, Libya argues, its Application is admissible in any event.

43. In the view of the Court, this last submission of Libya must be upheld. The date, 3 March 1992, on which Libya filed its Application, is in fact the only relevant date for determining the admissibility of the Application. Security Council resolutions 748 (1992) and 883 (1993) cannot be taken into consideration in this regard, since they were adopted at a later date. As to Security Council resolution 731 (1992), adopted before the filing of the Application, it could not form a legal impediment to the admissibility of the latter because it was a mere recommendation without binding effect, as was recognized moreover by the United States. Consequently, Libya's Application cannot be held inadmissible on these grounds.

44. In the light of the foregoing, the Court concludes that the objection to admissibility derived by the United States from Security Council resolutions 748 (1992) and 883 (1993) must be rejected, and that Libya's Application is admissible.

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45. The Court will now consider the third objection raised by the United States. According to that objection, Libya's claims have become moot because Security Council resolutions 748 (1992) and 883 (1993) have rendered them without object; any judgment which the Court might deliver on the said claims would thenceforth be devoid of practical purpose.

The Court has already acknowledged, on several occasions in the past, that events subsequent to the filing of an application may "render an application without object" (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 95, para. 66) and "therefore the Court is not called upon to give a decision thereon" (*Nuclear Tests (Australia* v. *France), Judgment, I.C.J. Reports 1974*, p. 272, para. 62) (cf. *Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 38).

Thus formulated, the Respondent's objection is that there is no ground for proceeding to judgment on the merits, which objection must be examined within the framework of this jurisprudence.

46. The Court must satisfy itself that such an objection does indeed fall within the provisions of Article 79 of the Rules, relied upon by the Respondent. In paragraph 1, this Article refers to "Any objection . . . to the jurisdiction of the Court or to the admissibility of the application, *or other objection*" (emphasis added); its field of application *ratione materiae* is thus not limited solely to objections regarding jurisdiction and admissibility. However, if it is to be covered by Article 79, an objection must also possess a "preliminary" character. Paragraph 1 of Article 79 of the Rules of Court characterizes as "preliminary" an objection "the decision upon which is requested before any further proceedings". There can be no doubt that the objection envisaged here formally meets this condition. The Court would also recall that, in this instance, the Respondent is advancing the argument that the decisions of the Security Council could not form the subject of any contentious proceedings before the Court, since they allegedly determine the rights which the Applicant claims to derive from a treaty text, or at least that they directly affect those rights; and that the Respondent thus aims to preclude at the outset any consideration by the Court of the claims submitted by the Applicant and immediately terminate the proceedings brought by it. In so far as the purpose of the objection raised by the United States that there is no ground for proceeding to judgment on the merits is, effectively, to prevent, *in limine*, any consideration of the case on the merits, so that its "effect [would] be, if the objection is upheld, to interrupt further proceedings in the case", and "it [would] therefore be appropriate for the Court to deal with [it] before enquiring into the merits" (*Panevezys-Saldutiskis Railway, Judgment, 1939, P.C.I.J., Series A/B No. 76*, p. 16), this objection possesses a preliminary character and does indeed fall within the provisions of Article 79 of the Rules of Court.

Moreover it is incontrovertible that the objection concerned was submitted in writing within the time-limit fixed for the filing of the Counter-Memorial, and was thus submitted in accordance with the formal conditions laid down in Article 79.

47. Libya does not dispute any of these points. It does not contend that the objection thus derived by the United States from Security Council resolutions 748 (1992) and 883 (1993) is an objection on the merits, which does not fall within the provisions of Article 79 of the Rules of Court, nor does it claim that the objection was not properly submitted. What Libya contends is that this objection — like the objection of inadmissibility raised by the United States, and for the same reasons (see paragraph 41 above) — falls within the category of those which Article 79, paragraph 7, of the Rules of Court characterizes as objections "not possess[ing], in the circumstances of the case, an exclusively preliminary character".

On the contrary, the United States considers that the objection concerned possesses an "exclusively preliminary character" within the meaning of that provision. It contends, in particular, in support of this argument, that this

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objection does not require "the resolution of disputed facts or the consideration of evidence".

Thus it is solely on the question of the "exclusively" or "non-exclusively" preliminary character of the objection under consideration that the Parties are divided and on which the Court must now make a determination.

48. The present wording of Article 79, paragraph 7, of the Rules of Court was adopted by the Court in 1972. The Court has had occasion to examine its precise scope and significance in the Judgments it delivered in the case concerning *Military and Paramilitary Activities in and against Nicaragua (Nicaragua v. United States of America)*, on 26 November 1984 (*Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1984*, pp. 425-426) and on 26 June 1986 (*Merits, Judgment, I.C.J. Reports 1986*, pp. 29-31), respectively. As the Court pointed out in the second of those Judgments:

> "Under the Rules of Court dating back to 1936 (which on this point reflected still earlier practice), the Court had the power to join an objection to the merits 'whenever the interests of the good administration of justice require it' (*Panevezys-Saldutiskis Railway, P.C.I.J., Series A/B, No. 75*, p. 56), and in particular where the Court, if it were to decide on the objection, 'would run the risk of adjudicating on questions which appertain to the merits of the case or of prejudging their solution' (*ibid.*)." (*I.C.J. Reports 1986*, pp. 29-30, para. 39.)

However, the exercise of that power carried a risk,

> "namely that the Court would ultimately decide the case on the preliminary objection, after requiring the parties to fully plead the merits — and this did in fact occur (*Barcelona Traction, Light and Power Company, Limited, Second Phase, I.C.J. Reports 1970*, p. 3). The result was regarded in some quarters as an unnecessary prolongation of an expensive and time-consuming procedure" (*Ibid.*, p. 30, para. 39.)

The Court was then faced with the following choice: "to revise the Rules so as to exclude the possibility of joinder to the merits, so that every objection would have to be resolved at the preliminary stage, or to seek a solution which would be more flexible" (*ibid.*, p. 30, para. 40). The solution adopted in 1972 was ultimately not to exclude the power to examine a preliminary objection in the merits phase, but to limit the exercise of that power, by laying down the conditions more strictly. The Court concluded, in relation to the new provision thus adopted:

> "It thus presents one clear advantage: that it qualifies certain objections as preliminary, making it clear that when they are exclusively of that character they will have to be decided upon immediately, but if they are not, especially when the character of the objections is not exclusively preliminary because they contain both preliminary aspects and other aspects relating to the merits, they will have to be dealt with at the stage of the merits. This approach also tends to discourage the unnecessary prolongation of proceedings at the jurisdictional stage." (*Ibid.*, p. 31, para. 41.)

49. The Court must therefore ascertain whether, in the present case, the United States objection considered here contains "both preliminary aspects and other aspects relating to the merits" or not.

That objection relates to many aspects of the dispute. By maintaining that Security Council resolutions 748 (1992) and 883 (1993) have rendered the Libyan claims without object, the United States seeks to obtain from the Court a decision not to proceed to judgment on the merits, which would immediately terminate the proceedings. However, by requesting such a decision, the United States is requesting, in reality, at least two others which the decision not to proceed to judgment on the merits would necessarily postulate: on the one hand a decision establishing that the rights claimed by Libya under the Montreal Convention are incompatible with its obligations under the Security Council resolutions, and, on the other hand, a decision that those obligations prevail over those rights by virtue of Articles 25 and 103 of the Charter.

The Court therefore has no doubt that Libya's rights on the merits would not only be affected by a decision not to proceed to judgment on the merits, at this stage in the proceedings, but would constitute, in many respects, the very subject-matter of that decision. The objection raised by the United States on that point has the character of a defence on the merits. In the view of the Court, this objection does much more than "touch[ing] upon subjects belonging to the merits of the case" (*Certain German Interests in Polish Upper Silesia, Jurisdiction, Judgment No. 6, 1925, P.C.I.J., Series A, No. 6*, p. 15); it is "inextricably interwoven" with the merits (*Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 46).

The Court notes furthermore that the United States itself broached many substantive problems in its written and oral pleadings in this phase, and pointed out that those problems had been the subject of exhaustive exchanges before the Court; the United States Government thus implicitly acknowledged that the objection raised and the merits of the case were "closely interconnected" (*Barcelona Traction, Light and Power Company, Limited, Preliminary Objections, Judgment, I.C.J. Reports 1964*, p. 46, and the reference to *Pajzs, Csáky, Esterházy, Preliminary Objections, Judgment*

/...

P.C.I.J., Series A/B, No. 66, p. 9).

If the Court were to rule on that objection, it would therefore inevitably be ruling on the merits; in relying on the provisions of Article 79 of the Rules of Court, the Respondent has set in motion a procedure the precise aim of which is to prevent the Court from so doing.

The Court concludes from the foregoing that the objection of the United States according to which the Libyan claims have become moot as having been rendered without object does not have "an exclusively preliminary character" within the meaning of that Article.

50. Having established its jurisdiction and concluded that the Application is admissible, the Court will be able to consider this objection when it reaches the merits of the case.

*

* *

51. Lastly, the United States requested the Court, in the alternative, in the event that, notwithstanding the United States' objections, it should declare that it has jurisdiction and deem the Application admissible, to "resolve the case in substance now" by deciding, as a preliminary matter, that the relief sought by Libya is precluded.

As the Court has already indicated, it is the Respondent which sought to rely, in this case, on the provisions of Article 79 of the Rules. By raising preliminary objections, it has made a procedural choice the effect of which, according to the express terms of Article 79, paragraph 3, is to suspend the proceedings on the merits. The Court cannot therefore uphold the claim of the United States.

*

* *

52. In accordance with Article 79, paragraph 7, of the Rules of Court, time-limits for the further proceedings shall be fixed subsequently by the Court.

*

* *

53. For these reasons,

THE COURT,

(1) *(a)* by thirteen votes to two, *rejects* the objection to jurisdiction raised by the United States on the basis of the alleged absence of a dispute between the Parties concerning the interpretation or application of the Montreal Convention of 23 September 1971;

IN FAVOUR: *Vice-President* Weeramantry, *Acting President*; *Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc El-Kosheri;

AGAINST: *President* Schwebel; *Judge* Oda;

(b) by thirteen votes to two, *finds* that it has jurisdiction, on the basis of Article 14, paragraph 1, of the Montreal Convention of 23 September 1971, to hear the disputes between Libya and the United States as to the interpretation or application of the provisions of that Convention;

IN FAVOUR: *Vice-President* Weeramantry, *Acting President*; *Judges* Bedjaoui, Guillaume, Ranjeva, Herczegh, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc El-Kosheri;

AGAINST: *President* Schwebel; *Judge* Oda;

(2) *(a)* by twelve votes to three, *rejects* the objection to admissibility derived by the United States from Security Council resolutions 748 (1992) and 883 (1993);

/...

IN FAVOUR: *Vice-President* Weeramantry, *Acting President*; *Judges* Bedjaoui, Guillaume, Ranjeva, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek;

AGAINST: *President* Schwebel, *Judges* Oda, Herczegh;

(b) by twelve votes to three, *finds* that the Application filed by Libya on 3 March 1992 is admissible.

IN FAVOUR: *Vice-President* Weeramantry, *Acting President*; *Judges* Bedjaoui, Guillaume, Ranjeva, Shi, Fleischhauer, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek; *Judge* ad hoc El-Kosheri;

AGAINST: *President* Schwebel, *Judges* Oda, Herczegh;

(3) by ten votes to five, *declares* that the objection raised by the United States according to which the claims of Libya became moot because Security Council resolutions 748 (1992) and 883 (1993) rendered them without object, does not, in the circumstances of the case, have an exclusively preliminary character.

IN FAVOUR: *Vice-President* Weeramantry, *Acting President*; *Judges* Bedjaoui, Ranjeva, Shi, Koroma, Vereshchetin, Parra-Aranguren, Kooijmans, Rezek, *Judge* ad hoc El-Kosheri;

AGAINST: *President* Schwebel, *Judges* Oda, Guillaume, Herczegh, Fleischhauer.

Done in French and in English, the French text being authoritative, at the Peace Palace, The Hague, this twenty-seventh day of February, one thousand nine hundred and ninety-eight, in three copies, one of which will be placed in the archives of the Court and the others transmitted to the Government of the Great Arab Libyan Jamahiriya and the Government of the United States of America, respectively.

(Signed) Christopher G. WEERAMANTRY,
Vice-President.

(Signed) Eduardo VALENCIA-OSPINA,
Registrar.

Judges BEDJAOUI, RANJEVA and KOROMA append a joint declaration to the Judgment of the Court; Judges GUILLAUME and FLEISCHHAUER append a joint declaration to the Judgment of the Court; Judge HERCZEGH appends a declaration to the Judgment of the Court.

Judges KOOIJMANS and REZEK append separate opinions to the Judgment of the Court.

President SCHWEBEL and Judge ODA append dissenting opinions to the Judgment of the Court.

(Initialled) C.G.W.

(Initialled) E.V.O.

Where a declaration or opinion has been submitted in the two official languages of the Court, both texts are rep

Where a declaration or opinion has been submitted in one of the two official languages of the Court, its translatio
the other official language will appear in the printed version of the Judgment.

DECLARATION DE M. HERCZEGH

J'ai voté contre les paragraphes 2, lettres *a)* et *b)*, et 3 du dispositif, pour des motifs analogues à ceux qui ont fait l'objet de la déclaration que j'ai jointe à l'arrêt rendu ce jour en l'affaire relative à des *Questions d'interprétation et d'application de la convention de Montréal de 1971 résultant de l'incident aérien de Lockerbie (Jamahiriya arabe libyenne c. Royaume-Uni)*.

Je prie donc le lecteur de se référer au texte de ladite déclaration.

(Signé) Géza HERCZEGH.

SEPARATE OPINION OF JUDGE KOOIJMANS

1. I have voted in favour of the operational part of the Judgment since I concur with the Court's finding that it has jurisdiction to entertain the claim as submitted by Libya and that this claim is admissible. I also share the view expressed in the Judgment that a number of the objections submitted by the Respondent do not have an exclusively preliminary character. Since, however, the Judgment does not reflect fully my own considerations I wish to place on record my views on some specific arguments brought forward by the Parties. I will do so rather succinctly with regard to the objections to the jurisdiction of the Court and in a slightly more comprehensive way with regard to the objections to the admissibility of the claim and to the objection that the Libyan claims have been rendered moot, or that Libya is precluded from obtaining the relief it seeks, by the subsequent adoption of Security Council resolutions 743 (1992) and 883 (1993).

(i) *Jurisdictional issues*

2. It would be a truism to contend that the present case is a politically highly sensitive one. As the Court has stated many times before, the fact that a dispute brought before it has serious political overtones does not act as a bar to the Court's entertaining it, nor does the fact that the dispute is being dealt with simultaneously by the Security Council.

In the present case the Respondent has gone further than pointing out merely these elements. It has intimated that Libya has not invoked the Court's jurisdiction under the Montreal Convention in order to settle a dispute which has arisen under that Convention but for other — quite unconnected — reasons.

> As it is stated in the written pleading submitted by the United States:
>
> "This dispute does not relate to the Montreal Convention. It relates to Libya's obligations to comply with the decisions of the Security Council . . . the Court ought not allow Libya to abuse the Court's jurisdiction to entertain disputes that do not arise under the Montreal Convention." (Preliminary Objections of the United States of America, p. 76, para. 3.22.)

3. The Respondent not only denies that there exists a dispute with Libya on the interpretation or application of the Montreal Convention, it also casts serious doubts on Libya's motives to construe such a dispute; the Court should not allow itself to be lured into such a politically-inspired hoax. I have chosen the rather extreme wording of this last sentence on purpose in order to show how easily the Court can be portrayed as an instrument used by one of the Parties for extrajudicial purposes. And this risk becomes an acute danger if the impression arises that the Court is used as a pawn in a game of chess where other principal organs of the United Nations play a role.

4. Against this background it seems proper and worthwhile to point out once more what is the function of the Court according to the Charter and its Statute, which forms an integral part of that Charter. This function was described in apposite terms by the Court itself in its Judgment of 20 December 1988 in the *Border and Transborder Armed Actions* case:

> "the Court is aware that political aspects may be present in any legal dispute brought before it. The Court, as a judicial organ, is however only concerned to establish, first, that the dispute before it is a legal dispute, in the sense of a dispute capable of being settled by the application of principles and rules of international law, and secondly, that the Court has jurisdiction to deal with it, and that that jurisdiction is not fettered by any circumstance rendering the application inadmissible. The purpose of recourse to the Court is the peaceful settlement of disputes; the Court's judgment is a legal pronouncement, and it cannot concern itself with the political motivation which may lead a State at a particular time, or in particular circumstances, to choose judicial settlement" (*Border and Transborder Armed Actions (Nicaragua* v. *Honduras), Jurisdiction and Admissibility, Judgment, I.C.J. Reports 1988*, p. 91, para. 52).

5. Whether the eventual finding of the Court on the merits is compatible with binding decisions of other United Nations organs, in particular the Security Council, is quite another matter and in the Court's view must be considered at a later stage. The first task of the Court after a case is submitted to it is to consider whether the case concerns a legal dispute and whether it has jurisdiction to deal with it. As the Court said in the *Nuclear Tests* cases: "the existence of a dispute is the primary condition for the Court to exercise its judicial function". The Court went on to say that "it is not sufficient for one party to assert that there is a dispute", nor, it may be added, is it sufficient that the other party denies that there is a dispute. Referring to what is said in the case concerning *Interpretation of Peace Treaties with Bulgaria, Hungary and Romania* (*I.C.J. Reports 1950*, p. 74), the Court stated that "whether there exists an international dispute is a matter for objective determination" by it (*Nuclear Tests* cases, *I.C.J. Reports 1974*, p. 270, para. 55).

6. If the Court, therefore, is determining the existence or the non-existence of a legal dispute, it is carrying out its

proper judicial function. In this respect it is in my view not relevant that the Respondent does not rely on the Montreal Convention and contends that it has no dispute with Libya concerning its interpretation or application. It is not in dispute between the Parties that the facts of the Lockerbie incident as such may be characterized as an act defined in Article 1 of the Montreal Convention which would imply that the Convention could be applicable to that incident and — under normal circumstances — would be applicable. The Respondent has stated that this does not mean that no other rules of international law are applicable to these facts and by bringing the situation to the attention of the Security Council as a potential threat to peace and security resulting from State-sponsored terrorism it has relied on the provisions of the United Nations Charter. Under such circumstances the Montreal Convention would not be the only and exclusively applicable instrument as is contended by the Applicant.

7. The resulting difference of opinion is therefore not an abstract disagreement about the applicability of the Montreal Convention, it is a very precise legal dispute about its applicability to the very facts of the case before the Court. The fact that the Security Council by adopting resolution 731 implicitly denied the Convention's applicability to these facts can in no way detract from the Court's own competence and its own responsibility to determine whether the dispute as submitted by the Applicant is a justiciable dispute within the terms of Article 14, paragraph 1, of the Montreal Convention, the settlement of which is entrusted to the Court. To conclude otherwise would impair the proper function of the Court as it is determined in the Charter and the Statute. By implication the Court has also jurisdiction to entertain the claims by Libya that the Respondents have not respected Libya's rights under Article 7 of the Convention, respectively their own obligations under Article 11, since these are the specific claims submitted by the Applicant. Whether the Court will have to deal with these specific claims will, of course, depend upon the Court's finding on the preliminary question of the Convention's applicability in view of the resolutions of the Security Council.

8. The Court's jurisdiction in my view is confined to the issues just mentioned which are covered by the terms of Article 14, paragraph 1, of the Montreal Convention, *viz.* the issues of applicability and compliance or non-compliance. In particular the ways and means by which this non-compliance is practised and the question whether these ways and means are at variance with the Charter of the United Nations and with mandatory rules of general international law do not come within the Court's jurisdiction as consensually agreed upon in Article 14, paragraph 1, of the Convention.

9. I, therefore, fully agree with the Court's finding that it has jurisdiction to hear the dispute between the Applicant and the Respondent in accordance with Article 14, paragraph 1, of the Montreal Convention. That I nevertheless have expressed some personal views on the issue of jurisdiction is because I deem it important to point out that in this regard the competences of the Security Council and the Court are separate and clearly distinguishable, and should not be confused, let alone be seen as potentially conflicting with each other. Just as each State is entitled to bring a situation to the attention of the Security Council and the Council is entitled to give its views on that situation and to qualify it as a threat to international peace and security, so each State is entitled to submit to the Court a claim against another State with regard to a dispute which in its opinion is justiciable. It is for the Court and only for the Court to determine whether it is competent to entertain the claim on the basis of the relevant legal provisions.

(ii) *Issues of admissibility and mootness*

10. Whether the Court, once it has assumed jurisdiction, should carry out its judicial function under all circumstances, is quite a different matter. The Respondents have submitted that any rights which Libya might have under the Montreal Convention are in any event superseded by its obligations under Security Council resolutions 748 (1992) and 883 (1993) which were adopted after the date of the filing of Libya's Application. Consequently, any judgment on the merits would be an empty one because it would be neither applicable nor enforceable.

11. It seems to be a question of minor relevance whether this objection must be called an objection to the admissibility and consequently must be rejected since these resolutions were adopted after the date of the filing of the Application which according to the Judgment is the only relevant date for determining the admissibility or whether it must be qualified as an "objection the decision upon which must be determined before any further proceedings" in the sense of Article 79, paragraph 1, of the Rules of Court.

12. It may be questioned whether it is necessary or even possible to give a neat categorization of preliminary objections. S. Rosenne says in this respect:

> "All that can be deduced from experience is that it is an individual matter to be appreciated in the light of all the circumstances of each case." (S. Rosenne, *The Law and Practice of the International Court of Justice 1920-1996*, 1997, p. 883.)

In this respect reference may be made also to the *Northern Cameroons* case where the Court, commenting on the various meanings ascribed by the Parties to, *inter alia*, the term "admissibility" said:

> "The Court recognizes that these words in differing contexts may have various connotations but it does not find it necessary in the present case to explore the meaning of these terms. For the

> purposes of the present case, a factual analysis undertaken in the light of certain guiding principles may suffice to conduce to the resolution of the issues to which the Court directs its attention." (*Northern Cameroons, Judgment, I.C.J. Reports 1963*, p. 28.)

13. Irrespective of the question whether preliminary objections should be distinguished as to category, this contextual analysis is exactly what the Court has undertaken in the present Judgment. Taking into account all circumstances of the case it has come to the conclusion that the objection that Security Council resolutions 748 (1992) and 883 (1993) have rendered the Libyan claim "moot" is an objection which possesses a preliminary character and falls within the provisions of Article 79 of the Rules of Court. Nevertheless, the Court has concluded that this objection does not have an exclusively preliminary character within the meaning of Article 79, paragraph 7, and, therefore, should be considered at the stage of the merits.

14. I share this view of the Court. I have, however, the feeling that some additional remarks would be appropriate in light of the fact that the Respondent has not denied that this objection may touch upon the merits. They are of the opinion that the case should nevertheless be terminated at the present stage as any judgment on the merits would be without practical effect since the relief sought by Libya cannot be provided by the Court because of the overriding legal effects of the mandatory resolutions of the Security Council. As counsel for the United States said:

> "The Court is under no compulsion to pass on the merits of Libya's claims under the Montreal Convention if it believes, as we do, that those claims are, as a matter of substantive law, superseded by the decisions of the Council, whether or not those claims are valid under the terms of the Convention. Nothing precludes the Court from deciding the case *in substance* (emphasis added) on this basis, without having to inquire further into Libya's assertions under the Convention." (CR 97/19, p. 47.)

In this respect explicit reference was made to the Court's finding in the *Northern Cameroons* case, where it said:

> "The Court's judgment must have some practical consequence in the sense that it can affect existing legal rights or obligations of the parties, thus removing uncertainty from their legal relations." (*I.C.J. Reports, 1963*, p. 34.)

15. It seems questionable, however, whether this reference to the *Northern Cameroons* case is correct. The Court's reasoning was based on the argument that a judgment on the merits would not be a judgment capable of effective application since the decision of the General Assembly (res. 1608 (XV)) to terminate the Trusteeship over the British Cameroons (which mooted the case between the United Kingdom and the Republic of Cameroon) was an administrative measure of a determinative and final character. A finding of a breach of law by the Court could not lead to redress as the General Assembly was no longer competent with regard to the Territory pursuant to the termination of the Trusteeship as a result of resolution 1608 (XV) and consequently no determination reached by the Court could be given effect by the former Administering Authority (*ibid.*, p. 35).

16. Even less appropriate seems the reference by the United States to the Court's decision in the 1974 *Nuclear Tests* cases where it found that "the claim of the Applicant (Australia) no longer has any object and that the Court is therefore not called to give a decision thereon". This finding was based on the fact that in the view of the Court the dispute brought before the Court no longer existed, since the Respondent (France) had unilaterally undertaken an obligation which fully met the claim of the applicant State. It deserves notice, however, that the Court ruled that the case could be re-opened if the Respondent would not comply with its commitment (*I.C.J. Reports 1974*, pp. 270 ff.).

17. Both the *Northern Cameroons* case and the *Nuclear Tests* cases make clear that a decision that a claim no longer has any object can only be made within a highly concrete context. It is "the circumstances which have arisen" which bring the Court to the determination that "it does not enter into the adjudicatory functions of the Court to deal with issues *in abstracto*, once it has reached the conclusion that the merits of the case no longer fall to be determined" (*I.C.J. Reports 1974*, p. 272).

18. In the present case circumstances are different: neither is there an administrative measure of a determinative and final character taken by an organ of the United Nations, nor is there a satisfaction of the Applicant's claim. Resolutions of the Security Council taken under Chapter VII of the Charter may have far-reaching legal effects, but they are not irrevocable or unalterable. In the exercise of its function the Security Council is free to confirm, revoke or amend them and consequently they cannot be called "final" even if during their lifetime they may be dispositive of the rights and obligations of member States, overriding rights and obligations these States may have under other treaties. It is generally agreed that the Security Council has full competence under Chapter VII to determine that a factual situation constitutes a threat to international peace and security and that it may take the necessary legally binding measures to counter that threat, but that it has no competence to determine the law, whereas it has been questioned whether the Council can modify the law when applying it to a particular set of facts (see e.g. Malcolm Shaw, *The Security Council and the International Court of Justice: Judicial Drift and Judicial Function*, in A.S. Muller a.o. (eds.), *The International Court of Justice - Its Future Role after Fifty Years*, 1997, pp. 219 ff.).

19. Since Security Council resolutions 748 (1992) and 883 (1992) have authoritatively but *not definitively* and for

an indefinite period of time determined the matters at issue, the Court rightly concluded that the objection by the Respondents that the Libyan claims are without objective (moot) does not have "an exclusively preliminary character" and will be considered by the Court when it reaches the merits of the case. By doing so the Court has upheld its function as it is defined in Article 38 of the Statute, *viz.* "to decide in accordance with international law such disputes as are submitted to it", at the same time respecting fully the competences which the Security Council has under the Charter.

20. Distinguishing carefully the proper functions of both Security Council and Court in my view is essential for what Judge Lachs called "a fruitful interaction" between these two main organs of the United Nations. These functions are complementary and in that sense can be mutually supportive.

(iii) *Concluding remarks*

21. One final remark may be made. The Respondent has invoked the concept of "judicial economy" when advocating a dismissal of the case in the preliminary phase. It has warned for proceedings on the merits which will be lengthy, arduous and extremely complicated and added that

> "such a difficult and lengthy procedure would ... be wholly without purpose if in the end the Court concludes that Libya must comply with the Council's decisions and surrender the two accused persons for trial in the United States or the United Kingdom ..." "It is clearly within the power of the Court to avoid unnecessary examination of immaterial and more difficult legal and factual issues" (Preliminary Objections of the United States of America, pp. 112-113).

It cannot be excluded that this might be the case indeed, although this is by no means certain as it was in the *Northern Cameroons* case.

22. Judicial economy however may go to the detriment of judicial propriety which asks for a careful weighing of the interests of all parties to the dispute. In this respect it is worthwhile to recall what Judge Read said in his dissenting opinion in the *Anglo-Iranian Oil Company* case:

> "It is impossible to overlook the grave injustice which would be done to an applicant State, by a judgment upholding an objection to the jurisdiction and refusing to permit adjudication on the merits, and which, at the same time, decided an important issue of fact or law, forming part of the merits, against the applicant State. The effect of refusal to permit adjudication of the dispute would be to remit the applicant and respondent States to other measures, legal or political, for the settlement of the dispute. *Neither the applicant nor the respondent should be prejudiced, in seeking an alternative solution of the dispute, by the decision of any issue of fact or law that pertains to the merits.*" (emphasis added). (*I.C.J. Reports 1952*, p. 149.)

23. It certainly cannot be foreseen that alternative solutions, e.g., on the basis of suggestions made by regional organizations or other international or national groupings, will be found and at present that may even seem improbable but neither can it be excluded. The Court should not be seen as standing in the way of any conciliatory effort.

(*Signed*) P. H. KOOIJMANS.

OPINION INDIVIDUELLE DE M. REZEK

1. Puisque l'Etat défendeur, en contestant ainsi tant la compétence de la Cour que la recevabilité de la requête, a mis l'accent sur la force obligatoire et la primauté des résolutions 748 (1992) et 883 (1993) du Conseil de sécurité à la lumière des articles 25 et 103 de la Charte des Nations Unies, je suis d'avis que l'arrêt auquel je souscris rendrait plus complètement compte de l'argumentation des Parties s'il consacrait quelques lignes au thème de la compétence de la Cour par rapport à celle des organes politiques de l'Organisation.

2. L'article 103 de la Charte est une règle de solution de conflit entre traités : il présuppose avant tout l'existence d'une opposition entre la Charte des Nations Unies et un autre engagement conventionnel. Il résout le conflit en faveur de la Charte, sans égard à la chronologie des textes. Mais il n'entend pas opérer au détriment du droit international coutumier et moins encore au préjudice des principes généraux du droit des gens. Et c'est bien la Charte des Nations Unies (non une résolution du Conseil de sécurité, une recommandation de l'Assemblée générale ou un arrêt de la Cour internationale de Justice) qui bénéficie de la primauté établie dans cette norme : c'est la Charte avec tout le poids de ses principes, de son système et de la répartition de compétences qu'elle réalise.

3. D'autre part, la Cour est l'interprète définitif de la Charte des Nations Unies. C'est à la Cour qu'il appartient de procéder à la détermination du sens de chacune de ses prescriptions et de l'ensemble du texte, et il s'agit là d'une responsabilité qui devient particulièrement grave lorsque la Cour est confrontée à la mise en question de décisions de l'un des deux organes politiques principaux de l'Organisation. Veiller à assurer la primauté de la Charte dans son sens précis et complet est parmi les tâches incombant à la Cour une des plus éminentes et la Cour, de plein droit et par devoir, fait en sorte qu'il en soit ainsi chaque fois que l'occasion se présente, même si cela peut en théorie conduire à la critique d'un autre organe des Nations Unies, ou plutôt au désaveu de l'exégèse de la Charte que fait cet organe.

Lors de l'affaire du *Timor oriental*, M. Skubiszewski a eu l'occasion de rappeler :

> «La Cour est compétente, ainsi que le montrent plusieurs arrêts et avis consultatifs, pour interpréter et appliquer les résolutions de l'Organisation. Elle est compétente pour se prononcer sur leur légalité, et notamment sur la question de savoir si elles sont *intra vires*. Cette compétence découle de la fonction de la Cour en tant qu'organe judiciaire principal de l'Organisation des Nations Unies. Les décisions de l'Organisation (au sens large que cette notion a en vertu des dispositions de la Charte relatives au vote) peuvent être examinées par la Cour du point de vue de leur légalité, de leur validité et de leur effet. Les conclusions de la Cour sur ces questions mettent en cause les intérêts de tous les Etats Membres, ou du moins de ceux qui sont visés par les résolutions en question. Mais ces conclusions restent dans les limites fixées par la règle énoncée dans l'affaire de l'*Or monétaire*. En évaluant les diverses résolutions de l'Organisation des Nations Unies concernant le Timor oriental par rapport aux droits et aux devoirs de l'Australie, la Cour ne contreviendrait pas à la règle du fondement consensuel de sa compétence.» (*C.I.J. Recueil 1995*, p. 251.)

Dans le passé, des juges aussi pondérés que sir Gerald Fitzmaurice ont fait état de cette compétence, et l'autorité de la doctrine allait dans le même sens. Il y a bien longtemps que M. Olivier Lissitzyn proposait :

> «If the organization is to gain strength, the authority to give binding interpretations of the Charter, at least in matters directly affecting the rights and duties of states, must be lodged somewhere, preferably in a judicial organ. The long-range purposes and policies laid down in the Charter must be given some protection against the possible short-range aberrations of the political organs. Power without law is despotism.» (O. J. Lissitzyn, *The International Court of Justice*, New York, 1951, pp. 96-97.)

La thèse suivant laquelle le contrôle judiciaire de l'interprétation de la Charte auquel a procédé un organe politique ne peut se faire que dans l'exercice de la compétence consultative est totalement dénuée de fondement scientifique. Il est seulement vrai qu'aucun Etat n'est autorisé par le système à consulter la Cour sur une question constitutionnelle des Nations Unies ni à soulever une telle question par le biais d'une action *directe* contre l'Organisation ou contre un organe comme le Conseil de sécurité. Mais la question constitutionnelle — ayant trait, par exemple, à un cas d'excès de pouvoir — peut parfaitement se poser dans le contexte du contentieux entre Etats. Il est fort naturel, dans un tel cadre, que la requête soit dirigée contre l'Etat qui, pour une raison quelconque, aurait pris à sa charge d'exécuter l'acte du Conseil, bien que cet acte fut contesté au regard de la Charte ou de n'importe quelle norme du droit international général. Le sujet passif de l'action n'est point donc le législateur, mais l'exécuteur immédiat de la loi, tel que cela se produit d'ordinaire, devant les juridictions internes, dans le cadre d'une procédure d'*habeas corpus* et dans le contexte d'actions civiles pour la protection de droits autres que la liberté individuelle.

4. La Cour jouit d'une pleine compétence pour l'interprétation et l'application du droit dans une affaire

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contentieuse, même quand l'exercice de cette compétence peut entraîner l'examen critique d'une décision d'un autre organe des Nations Unies. Elle ne représente pas directement les Etats Membres de l'Organisation (on l'a rappelé du haut de la tribune, et on a voulu en tirer comme conséquence l'incompétence de la Cour pour procéder à l'examen des résolutions du Conseil), mais c'est justement son imperméabilité à l'injonction politique qui fait de la Cour l'interprète par excellence du droit et le for naturel de la revision, au nom du droit, des actes des organes politiques, tel qu'il est de rigueur dans les régimes démocratiques. Ce serait bien une source d'étonnement si le Conseil de sécurité des Nations Unies devait jouir d'un pouvoir absolu et incontestable à l'égard de la règle de droit, privilège dont ne jouissent pas, en droit interne, les organes politiques de la plupart des fondateurs et des autres membres de l'Organisation, à commencer par les deux Etats défendeurs.

C'est aux Etats Membres des Nations Unies, au sein de l'Assemblée générale et du Conseil de sécurité, qu'appartient le pouvoir de légiférer, de changer s'ils le veulent les règles qui président au fonctionnement de l'Organisation. Dans l'exercice de la fonction législative, ils peuvent décider, par exemple, que l'Organisation peut se passer d'un organe judiciaire, ou que celui-ci, contrairement aux modèles nationaux, n'est pas l'interprète ultime de l'ordre juridique de l'Organisation, lorsque se pose la question de la validité d'une décision d'un autre organe du système. A ce que l'on sait, ils n'ont jamais songé à agir ainsi, et je pense que la Cour ne devrait pas être timide dans l'affirmation d'une prérogative qui lui revient de par la volonté présumée des Nations Unies.

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DISSENTING OPINION OF PRESIDENT SCHWEBEL

I regret that I am unable to agree with the Judgment of the Court. It is arguable that the challenge of the Respondent to the jurisdiction of the Court should not carry. But the reasons so tersely stated by the Court are conclusory rather than elucidatory, and, at most, are barely persuasive in a subsidiary respect. In my view, the Court's conclusions on the admissibility of Libya's Application, and as to whether it has become moot, are unpersuasive.

Jurisdiction

The question of whether the Court has jurisdiction over a dispute between the Parties under the Montreal Convention for the Suppression of Unlawful Acts Against the Safety of International Civil Aviation depends on the resolution of antecedent questions. Does the Montreal Convention apply to the facts at issue in the current case? If it does, do the positions of the Parties in this case give rise to a dispute under the Convention?

The Preamble to the Convention declares its purpose to be that of "deterring" unlawful acts against the safety of civil aviation and providing appropriate measures for punishment of offenders. Article 10 provides that contracting States shall "endeavour to take all practicable measure for the purpose of preventing the offences mentioned in Article 1." Article 12 provides that any contracting State having reason to believe one of the offences mentioned in Article 1 will be committed shall furnish relevant information to other States concerned. These provisions may be interpreted to imply that the Convention does not apply to allegations against persons accused of destroying an aircraft who are claimed, as in the instant case, to be acting as agents of a contracting State. Or, if that implication is too extended, those provisions of the Montreal Convention suggest that the Convention would hardly have deterrent effect if the State accused of having directed the sabotage were the only State competent to prosecute the persons accused of the act. At the same time, Article 1 of the Convention capaciously provides that, "Any person" commits an offence under the Convention if he performs an act thereafter listed. Moreover, Libya has not accepted that the accused were agents of its Government.

If it be assumed that the Convention does apply to persons allegedly State agents who are accused of destroying an aircraft, the question then arises whether there is a dispute between Libya and the Respondent *under the Convention*.

It is difficult to show, and in its Judgment the Court in my view does not show (as contrasted with concluding), that the Respondent can be in violation of provisions of the Montreal Convention, with the possible exception of Article 11; the Court does not show that there is a dispute between the Parties over such alleged violations. The Convention in the circumstances of the case imposes multiple obligations on Libya. None of the articles of the Convention invoked by Libya in the circumstances of this case imposes obligations on the Respondent (as the opinion of Sir Robert Jennings in the proceedings between Libya and the United Kingdom demonstrates). At most, it might be maintained that there is a dispute over breach of an obligation under Article 11, which provides in paragraph 1 that, "Contracting States shall afford one another the greatest measure of assistance in connection with criminal proceedings brought in respect of the offences. The law of the State requested shall apply in all cases." The Respondent, the State requested, has provided Libya with the indictment, but, in reliance upon the resolutions of the Security Council and its own law, has not, despite Libyan requests, done more. If in fact Libya has brought criminal proceedings against the accused, there is arguable ground for alleging the existence of a dispute under Article 11, though in truth the dispute is over the force of the Security Council's resolutions.

The Court principally relies, in upholding jurisdiction, on its unexplicated conclusion that, in view of the positions of the Parties, there exists between them a dispute regarding the interpretation and application of Article 7. Article 7 provides:

> "The Contracting State in the territory of which the alleged offender is found shall, if it does not extradite him, be obliged, without exception whatsoever and whether or not the offence was committed on its territory, to submit the case to its competent authorities for the purpose of prosecution. Those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State."

The Respondent has not disputed Libya's obligation to prosecute the accused under Article 7 if Libya does not extradite them. It rather maintains that Libya is obliged by the supervening resolutions of the Security Council to surrender the accused for trial in the United States or the United Kingdom. Libya challenges this reading of the resolutions of the Security Council and contends that, if it is the right reading, the resolutions of the Security Council are unlawful and *ultra vires*. That is to say, there is no dispute between the Parties in this regard under Article 7 of the Montreal Convention. There is a dispute over the meaning, legality and effectiveness of the pertinent resolutions of the Security Council. The latter dispute may not be equated with the former. Consequently it does not fall within the jurisdiction of the Court under Article 14 of the Montreal Convention, which confines the Court's jurisdiction to "Any dispute between two or more Contracting States concerning the interpretation or application of this Convention . . ." Libya's complaint that the Security Council has acted unlawfully can hardly be a claim under the Montreal Convention falling within the jurisdiction of the Court pursuant to that Convention.

The Court holds that there is a further, overarching dispute between the Parties, because

> "The Parties differ on the question whether the destruction of the Pan Am aircraft over Lockerbie is governed by the Montreal Convention. A dispute thus exists between the Parties as to the legal régime applicable to this event. Such a dispute, in the view of the Court, concerns the interpretation and application of the Montreal Convention, and in accordance with Article 14, paragraph 1, of the Convention, falls to be decided by the Court."

That holding is not without formal force. But, as in this case, it lends itself to undue extension of the jurisdiction of the Court. If two States are parties to a treaty affording jurisdiction to the Court in disputes over its interpretation or application, is there a dispute under the treaty merely because one party so maintains — or maintains that the treaty constitutes the governing legal régime — while the other denies it?

It is in any event obvious that the Montreal Convention cannot afford the Court jurisdiction over Libya's submission that the Respondent

> "is under a legal obligation to respect Libya's right not to have the Convention set aside by means which would in any case be at variance with the principles of the United Nations Charter and with the mandatory rules of general international law prohibiting the use of force and the violation of the sovereignty, territorial integrity, sovereign equality and political independence of States" (Memorial of Libya, p. 255).

Disputes under the Montreal Convention do not import those arising under the Charter and customary international law. Yet the Court's holding on this submission is equivocal. While it states that it cannot uphold the Respondent's objection, at the same time it confines the Court's jurisdiction to actions alleged to be at variance with the provisions of the Montreal Convention.

Finally, in respect of jurisdiction, the Court observes that Security Council resolutions 748 (1992) and 883 (1993) were adopted after the filing of Libya's Application on 3 March 1992. It holds that, in accordance with its established jurisprudence, if the Court had jurisdiction on that date, it continues to do so; subsequent adoption of the Security Council's resolutions cannot affect its jurisdiction once established. That holding by its terms does not resolve whether, on 3 March 1992, the Court had jurisdiction. For the reasons set out above, the conclusion that it did is dubious.

Moreover, the cases on which the Court relies in so holding hardly seem to apply to the instant situation. The question at issue in the relevant phase of the *Nottebohm* case was whether, where jurisdiction had been established at the date of the application by Declarations under the Optional Clause, it could be disestablished by subsequent lapse of a Declaration by expiry or denunciation. Inevitably the Court held that it could not. In the case concerning *Right of Passage over Indian Territory*, the Court concordantly held that,

> "It is a rule of law generally accepted, as well as one acted upon in the past by the Court, that, once the Court has been validly seised of a dispute, unilateral action by the respondent State in terminating its Declaration . . . cannot divest the Court of jurisdiction." (Preliminary Objections, *Judgment, I.C.J. Reports 1957*, p. 142.)

Nothing of the kind at issue in either of those cases is pertinent to the instant case. There is no question of the Respondent unilaterally taking action that purports to denounce the Montreal Convention or to excise Article 14 thereof. Rather the Security Council has taken multilateral action in pursuance of its Charter powers by adopting resolution 748 which, as the Court held at the provisional measures stage of this case, both Libya and the Respondent, "as Members of the United Nations, are obliged to accept and carry out . . . in accordance with Article 25 of the Charter" (*I.C.J. Reports 1992*, pp. 15, 126). The Court then held that,

> "in accordance with Article 103 of the Charter, the obligations of the Parties in that respect prevail over their obligations under any other international agreement, including the Montreal Convention" (*ibid.*)

That is no less true in 1998 than it was in 1992.

In its Judgment on jurisdiction and admissibility of 11 July 1996 in *Application of the Convention on the Prevention and Punishment of the Crime of Genocide*, the Court held that, "It is the case that the jurisdiction of the Court must normally be assessed on the date of the filing of the act instituting proceedings." (*I.C.J. Reports 1996*, para. 26, p. 613.) This most recent holding on the question imports that what is normal is not invariable; there is room for special treatment of the abnormal. The instant case, in which the Applicant challenges the legality and applicability to it of resolutions of the Security Council adopted to deal with what the Council held to be a threat to international peace, surely is one to be treated in the exceptional way to which the Court opened the door in 1996.

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DISSENTING OPINION OF JUDGE ODA

1. I regret that I am unable to agree with any of the three points in the operative part of the Judgment as I see the whole case from a different viewpoint to that of the Court.

I.

LACK OF JURISDICTION — NO DISPUTE IN TERMS OF THE 1971 MONTREAL CONVENTION

2. The crux of the case before us is simple in that, to use the expression used by Libya in its Application, the United States "continues to adopt a posture of pressuring Libya into surrendering the accused" and "is rather intent on compelling the surrender of the accused".

The United States and Libya have adopted different positions concerning the surrender (transfer) of the two Libyans who are accused of the destruction of Pan Am flight 103 over Lockerbie and who are located in Libya. Those differing positions of the applicant State and the respondent State did *not*, however, constitute a "dispute . . . concerning the interpretation or application of the [1971 Montreal] Convention" to which both are parties (Montreal Convention, Art. 14, para. 1).

It is my firm belief that the Application by which, on 3 March 1992, Libya instituted proceedings against the United States pursuant to Article 14, paragraph 1, of the Montreal Convention should be dismissed on the sole ground that the dispute, if one exists, between the two States is not one that "concern[s] the interpretation or application of the [Montreal] Convention".

In order to clarify this conclusion, I find it necessary to examine the chain of events which have occurred since the United States outlined, on 13 November 1991, its position on the Lockerbie incident and which led to Libya filing its Application on 3 March 1992.

A. The United States and Libya's respective claims

3. The destruction of the American Pan Am Flight 103 occurred on 21 December 1988 over Lockerbie, Scotland, in the territory of the United Kingdom and involved the death of 11 residents of Lockerbie, 259 passengers and crew, including 189 United States' nationals and at least 29 United Kingdom nationals, and a number of citizens of another 19 States.

The United States' demand that Libya surrender the suspects

4. After carefully conducting a scientific investigation of the crash evidence for a period of over three years, the United States considered that it had identified the two persons responsible for the explosion — then located in Libya — who were said to have been acting as agents of the Libyan Government. The United States' position is set out in the "indictment of the United States District Court for the District of Columbia" dated 14 November 1991, issued as United Nations documents A/46/831 and S/23317, Annex.

5. On 27 November 1991, the United States Government issued a joint declaration of the United States and the United Kingdom, reading:

> "The British and American Governments today declare that the Government of Libya must:
>
> —surrender for trial all those charged with the crime; and accept complete responsibility for the actions of Libyan officials;
>
> —disclose all it knows of this crime, including the names of all those responsible, and allow full access to all witnesses, documents and other material evidence, including all the remaining timers;
>
> —pay appropriate compensation.
>
> We expect Libya to comply promptly and in full." (See U.N. doc. A/46/827, S/23308, Ann.)

The second point seems to me to be contingent on the first point and the third point is nothing but a subsidiary request which was apparently not pursued by the United States.

6. On the same day, the United States and the United Kingdom, together with France (which had also been the victim of the destruction of an aircraft in flight, a UTA DC10, on 19 September 1989, in an attack allegedly carried out by Libyan agents), issued a tripartite declaration on terrorism. The declaration reads in part:

> "following the investigation carried out into the bombing[s] of Pan Am 103 ... the three States have presented specific demands to the Libyan authorities related to the judicial procedures that are under way. They require that Libya comply with all these demands, and, in addition, that Libya commit itself concretely and definitively to cease all forms of terrorist action and all assistance to terrorist groups. Libya must promptly, by concrete actions, prove its renunciation of terrorism." (See U.N. doc. A/46/828, S/23309, Ann.)

The main thrust of the United States' claim was the demand for the surrender of the suspects. In demanding the surrender of the suspects, the United States took no further action other than issuing a statement or declaration in this respect which was conveyed to Libya through the Belgium Government as the United States' protecting power.

Libya's response to the United States' demand

7. Libya responded to the accusation promptly on 15 November 1991 by means of Communiqué issued by the People's Committee for Foreign Liaison and International Cooperation (hereinafter "the Libyan People's Committee") in which it "categorically denie[d] that Libya had any association with that incident" and "reaffirm[ed] its condemnation of terrorism in all its forms". The Communiqué continued:

> "When a small, developing country such as Libya finds itself accused by super-Powers such as the United States [and the United Kingdom], it reserves its full right to legitimate self-defence before a fair and impartial jurisdiction, before the United Nations and before the International Court of Justice and other bodies.
>
> ....
>
> We urge the United States and the United Kingdom to be governed by the logic of the law, by wisdom and by reason and to seek the judgement of impartial international commissions of inquiry or of the International Court of Justice." (See U.N. doc. S/23221, Ann.)

8. The Libyan People's Committee commented in its 28 November 1991 Communiqué on the statements issued by the three States that:

> "[a]ll the applications [of the three States] will receive every attention, inasmuch as the competent Libyan authorities will investigate it and deal with the matter very seriously, in a manner that accords with the principles of international legitimacy, including the rights of sovereignty and the importance of ensuring justice for accused and victims"

and that

> "Libya takes a positive view of international *détente* and the atmosphere which it spreads and which establishes international peace and security and leads to the emergence of a new international order in which all States are equal, the freedom and options of peoples are respected and the principles of human rights and the United Nations Charter and the principles of international law are affirmed." (See U.N. doc. A/46/845, S/23417.)

9. On 2 December 1991, the Libyan People's Committee issued a further declaration refuting the United States' accusation against Libya and reiterating its readiness to see that justice was done in connection with the Lockerbie incident.

10. These responses from Libya dated 15 November 1991, 28 November 1991 and 2 December 1991 (as referred to above), which all three dealt with more general issues relating to acts of terrorism, certainly implied a categorical refusal by that State to accede to the United States' demand to surrender the suspects.

The real issues existing between the United States and Libya

11. Since making the announcement, on 14 November 1991, of the indictment for a criminal act relating to the Lockerbie incident, the United States has accused Libya in the strongest terms of having links with international terrorism. Libya, on the other hand, contended that no Libyan agent was linked to the Lockerbie incident but stated its willingness to make every effort to eliminate international terrorism and to co-operate with the United Nations for this purpose.

Despite the mutual accusations that were made in relation to the respective positions of the two States on international terrorism, that issue, however, is *not* in dispute between the two States in the present case. Rather, Libya insisted on carrying out any criminal justice procedure on its own territory where the suspects were to be found and made clear that it had no intention of surrendering them to the United States, although it later expressed its readiness to hand the two suspects over to a third, neutral, State or to an international tribunal. Libya accused

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the United States of attempting to cause difficulties in demanding the surrender of the suspects.

12. In fact, what occurred between the United States and Libya was simply a demand by the United States for the surrender to it of the suspects located in Libya and a refusal by Libya to comply with that demand.

In demanding the surrender of the two suspects, the United States made an attempt to justify that demand as an appeal that criminal justice be pursued. The United States did not claim that Libya would be legally bound under any particular law to surrender the two suspects. In *none* of the documents that it issued did the United States make any mention of the Montreal Convention *nor* did it accept that that Convention applied to the incident, including the matter of the surrender of the suspects. *Nor* did Libya, until January 1992, invoke the Montreal Convention as the basis of its refusal to surrender the two suspects to the United States.

Libya invokes the Montreal Convention only on 18 January 1992

13. On 18 January 1992, the Secretary of the Libyan People's Committee addressed a letter to the United States Secretary of State and the Foreign Secretary of the United Kingdom through the Embassies of Belgium and Italy which were entrusted with looking after the interests of those two countries in Libya. After pointing out that the United States, the United Kingdom and Libya were States parties to the 1971 Montreal Convention, Libya's letter stated:

> "out of respect for the principle of the ascendancy of the rule of law and in implementation of the Libyan Code of Criminal Procedure . . . as soon as the charges were made, Libya immediately exercised its jurisdiction over the two alleged offenders in accordance with its obligation under article 5, paragraph 2, of the Montreal Convention by adopting certain measures to ascertain their presence and taking immediate steps to institute a preliminary enquiry. It notified the States . . . that the suspects were in custody . . .
>
> As a State party to the Convention and in accordance with paragraph 2 of [article 5], we took such measures as might be necessary to establish our jurisdiction over any of the offences . . . because the alleged offender in the case was present in our territory.
>
> Moreover, article 7 of the Convention stipulates that the Contracting Party in the territory of which the alleged offender is found shall, if it does not extradite him, submit the case to its competent authorities for the purpose of prosecution and that those authorities shall take their decision in the same manner as in the case of any ordinary offence of a serious nature under the law of that State." (See U.N. doc. S/23441, Ann.)

14. It was in Libya's letter of 18 January 1992, as quoted above, that the 1971 Montreal Convention was first mentioned. The United States did not respond to that letter. The United States was then informed by the Registrar of the Court on 3 March 1992 of Libya's Application in which reference was again made to the Montreal Convention. It is important that this point should not be overlooked in deciding whether there did or did not exist, on the date of the Application (namely 3 March 1992), "any dispute . . . concerning the interpretation or application of the [Montreal] Convention which cannot be settled through negotiation" (Montreal Convention, Art. 14, para. 1).

B. The relevant issues of international law

The issues in the present case

15. There is no doubt that the 1971 Montreal Convention for the suppression of unlawful acts against the safety of civil aviation is, in general, applicable to the destruction of the American Pan Am aircraft which occurred in December 1988 over Lockerbie in the United Kingdom, as long as both Libya and the United States are parties to it.

Neither Party seems ever to have doubted that that destruction constituted a "crime" under the 1971 Convention. That point, however, is *not* in issue between the two States; *nor* is the prevention of international terrorism at issue in this case since proceedings were brought by Libya and *not* by the United States.

Furthermore, the question of whether the United States can hold Libya, as a State, responsible for the acts of Libyan nationals relating to the destruction of the American Pan Am aircraft over United Kingdom territory and of whether the explosion was caused by alleged Libyan intelligence agents (which would make Libya responsible for the acts committed by such persons), were *not* at issue either in the present Application which was instituted by Libya and *not* by the United States.

16. It would be wrong to consider that the present Application concerns the destruction of Pan Am flight 103 or, more generally, the Lockerbie incident as a whole which constituted an act of international terrorism. An application of that nature could have been filed by the United States but *not* by Libya.

The issues in the present case submitted by Libya to the Court relate solely to the demand of the Respondent, the

United States, that the Applicant, Libya, surrender the two suspects identified by the indictment of the Grand Jury in the District of Columbia as having caused the destruction of the Pan Am aircraft (clearly a crime pursuant to the Montreal Convention) and Libya's refusal to accede to the Respondent's demand. Relations between those two States regarding the case went no further than this.

Criminal jurisdiction

17. No State is prevented from exercising its criminal jurisdiction over a person or persons who have committed a crime on its territory, or a person or persons who have committed serious damage to its interest or against it nationals, or who have committed a crime of universal jurisdiction anywhere in the world. Accordingly, there is no doubt that in this case the United States is competent to exercise its criminal jurisdiction over the two suspects, whoever they may be and wherever they may be located.

Conversely, nor is there any doubt that any State is entitled to exercise its criminal jurisdiction over a serious crime committed by its nationals anywhere, either on its own territory or abroad. Libya's rights in this respect do not seem to have been challenged by the United States.

18. Thus, the right to prosecute or punish criminals does not fall within the exclusive jurisdiction of any particular State, either the State whose interest has been damaged (in this instance, the United States) or the State of which the criminal is a national (in this instance, Libya). The Libyan suspects in this case are subject to the concurrent jurisdictions of either the State where they have committed the crime or of the State where they are located. The Montreal Convention adds nothing to this general principle and does not deviate at all from it.

There is *no* difference in the views of the Applicant and the Respondent regarding the interpretation of those general rules of international law. There exists, apparently, *no* dispute in this respect.

19. The issues in this case arose *not* in relation to a legal question governing the rights and obligations of either Party to prosecute or punish the two suspects but are related rather to the fact that while the United States demanded that Libya transfer or surrender the two suspects located on its territory with a view to achieving criminal justice, Libya refused to accede to that demand, and, accordingly, the suspects have (so far) avoided the criminal jurisdiction of the United States.

Law of extradition

20. States have not been under an obligation to extradite accused persons under general international law but some specific treaties, either multilateral or bilateral, have imposed the obligation on contracting States to extradite accused persons to other contracting States. The Montreal Convention is certainly one of those treaties.

An exception to that obligation to extradite criminals is made, however, in the event that the accused are of the nationality of the State which is requested to extradite them. This rule of non-extradition of nationals of the requested State may not seem to be quite appropriate for the purposes of criminal justice, as the accused may more adequately be prosecuted in the country where the actual crime occurred. While no rule of international law prohibits extradition of nationals of the requested State, there is a long-standing international practice which recognizes that there is no obligation to extradite one's own nationals. The Montreal Convention is no exception as it does not provide for the extradition of nationals of the requested State even for the punishment of these universally recognized unlawful acts.

The rule of non-extradition of political criminals has long prevailed but that rule does not apply in the case of some universal crimes, such as genocide and acts of terrorism.

21. The Montreal Convention, however, goes one step further in the event that States do not extradite the accused to other competent States, by imposing the duty upon the State where the accused is located to bring the case before its own competent authorities for prosecution. Under the Montreal Convention, Libya would thus assume the responsibility to prosecute the accused if it did not extradite them. Libya has not challenged this point at all. Libya has claimed that it was proceeding to the prosecution of the suspects and it has also expressed its willingness to extradite them to what it maintains are certain politically neutral States.

C. Conclusion

22. Thus conceived, the question relating to the United States' demand that Libya surrender the two suspects and Libya's refusal to accede to that demand is not a matter of rights or legal obligation concerning the extradition of accused persons between the United States and Libya under international law *nor* is it a matter falling within the provisions of the Montreal Convention. Or, at least, there is no *legal* dispute concerning the interpretation or application of the Montreal Convention between Libya and the United States which could have been brought to arbitration or to the Court.

If there is any difference between them on this matter, that could simply be a difference between their respective policies towards criminal justice in connection with the question of which State should properly do justice on the matter. That issue does *not* fall within the ambit of the Montreal Convention.

From the outset, *no* dispute has existed between Libya and the United States "concerning the interpretation or application of the [Montreal] Convention" as far as the demand for the surrender of the suspects and the refusal to accede to that demand — the main issue in the present case — are concerned. Libya *neither* presented any argument contrary to that viewpoint *nor* proved the existence of such a legal dispute.

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23. I therefore conclude that *no* grounds exist on which the Court may exercise its jurisdiction to hear the present Application instituted by Libya.

II.

THE QUESTION OF ADMISSIBILITY — THE EFFECT OF THE SECURITY COUNCIL RESOLUTIONS

24. As I have stated above, I am firmly of the view that the Court lacks the jurisdiction to consider this Application filed by Libya. If the Court's jurisdiction is denied, as I believe it should be, the issue of whether the Application is or is not admissible does not arise. For me, at least, it is meaningless to discuss the question of admissibility.

However, the Court, after it

> "finds that it has jurisdiction on the basis of Article 14, paragraph 1, of the Montreal Convention .. to hear the disputes between Libya and the United States as to the interpretation or application of the provisions of that Convention" (Judgment, operative part (1) *(b)*),

continues to deal with the question of admissibility and finds that "the Application filed by Libya . . . is admissible" (*ibid.*, (2) *(b)*) by "reject[ing] the objection to admissibility derived by the United States from Security Council's resolutions 748 (1992) and 883 (1993)" (*ibid.*, (2) *(a)*). Despite the fact that I am of the view that the question of admissibility should not arise since the Court should dismiss the Application on the ground of lack of jurisdiction, I would now like to comment upon the impact of these Security Council resolutions, which is the only issue dealt with in the present Judgment in connection with whether the Application is admissible or not.

25. Before doing so, I also have to refer to another point in the Judgment on which I disagree. The Judgment states that the Court

> "*declares* that the objection raised by the United States according to which the claims of Libya became moot because Security Council resolutions 748 (1992) and 883 (1993) rendered them without object, does not, in the circumstances of the case, have an exclusively preliminary character." (Judgment, operative part (3).)

By finding the Application admissible, the Court certainly indicates that the objection of the United States that Libya's claims are without object as a result of the adoption of the Security Council resolutions does not have an exclusively preliminary character. In my view, however, this point should not form any separate or distinct issue from the question of admissibility but should be included in that question.

I believe that if the adoption of Security Council resolutions 748 and 883 is to be dealt with in connection with the question of admissibility of the Application, it should be dealt with at the present (preliminary) stage irrespective of whether this question possesses or not an *exclusively* preliminary character. I reiterate that the question of whether Libya's claims are without object because of the Security Council resolutions is a matter concerning admissibility which the Court should have dealt with at this stage.

A. Referral of the incident to the United Nations — particularly to the Security Council — by the Parties and their subsequent actions

26. It should be noted that the majority of the documents issued by the United States and Libya were communicated to the United Nations with the request that they be distributed as documents of both the General Assembly and the Security Council or of the Security Council alone (see paras. 4-7 above).

Referral of United States and Libyan documents to the United Nations

27. The United States only transmitted the relevant documents to the United Nations as late as 20 December 1991: (i) the Joint Declaration of 27 November 1991 was transmitted to the United Nations Secretary-General on 20 December 1991 and distributed as documents A/46/828 and S/23309; (ii) the indictment of the Grand Jury in the District of Columbia was presented to the United Nations Secretary-General on 23 December 1991 and was distributed as documents A/46/831 and S/23317.

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28. It was, however, *Libya* that had already informed the United Nations Secretary-General of the statements of the United States in which the accusation that the two suspects were involved in the Lockerbie incident was made. This occurred well before the United States transmitted its documents to the United Nations.

Three documents were transmitted by Libya to the United Nations: (i) Libya's first Communiqué was transmitted on 15 November 1991 to the President of the Security Council and was distributed as document S/23221; (ii) Libya's Communiqué responding to the three States' (the United Kingdom, the United States, and France) Joint Declaration of 27 November 1991 was transmitted on 29 November 1991, and was distributed as documents A/46/845 and S/23417; and (iii) a letter dated 18 January 1992 from the Secretary of the Libyan People's Committee addressed to the United States Secretary of State and to the Foreign Secretary of the United Kingdom was transmitted on that same day to the President of the Security Council and was distributed as document S/23441.

Libya's notification of the events to the United Nations

29. The relevant documents were thus transmitted by Libya for distribution to the delegates in the General Assembly and particularly to the members of the Security Council. In addition, a few days after the United Kingdom and the United States announced the indictment of the two Libyan suspects, the Secretary of the Libyan People's Committee sent letters addressed directly to the United Nations Secretary-General (as indicated in para. 30 below) in an effort to draw the attention of the United Nations member States to the chain of events that had unfolded since 13 November 1991, particularly in relation to the transfer of the suspects. Libya seems to have believed that the matters involved were not legal issues but were concerned with international peace and security, and, as such, were to be dealt with by the United Nations.

30. In (i) its letter to the Security Council of 17 November 1991, issued as United Nations document A/46/660 and S/23226, Libya requested a dialogue between itself, on the one hand, and the United States and the United Kingdom, on the other, and expressed its readiness to cooperate in the conduct of any neutral and honest enquiry. Libya affirmed its belief in the peaceful settlement of disputes, as provided for in Article 33, paragraph 1, of the Charter, which lays down that the parties to any dispute "shall, first of all, seek a solution by negotiation, enquiry, mediation, conciliation, arbitration, judicial settlement ..."; (ii) in its letter of 20 November 1991,issued as United Nations document A/46/844 and S/23416, Libya stated its "unconditional readiness to cooperate in order to establish the truth" and declared its "readiness to cooperate to the full with any impartial international judicial authority". This letter emphasized that the Charter "guarantees the equality of peoples and their right to make their own political and social choices, a right that is enshrined in religious laws and is guaranteed by international law"; (iii) in its letter of 8 January 1992, issued as United Nations document A/46/841 and S/23396, Libya stated:

> "If it is a matter of political differences between the three countries and Libya, then the differences must be discussed on the basis of the Charter of the United Nations, which does not endorse aggression or the threat of aggression but rather calls for the resolution of differences by peaceful means. Libya has expressed its readiness to pursue any peaceful means that the three countries may desire for the resolution of existing differences".

31. It is thus clear that the United States' demand for surrender of the two suspects, and Libya's immediate refusal to accede to that demand, had already been notified by Libya to the United Nations on 17 November 1991 — not apparently as legal issues existing solely between the two States but as matters concerning international peace and security in which the United Nations should be involved.

B. The Security Council resolutions

Security Council resolution 731 (1992) of 21 January 1992

32. On 20 January 1992 — that is to say two days after the Libyan letter of 18 January 1992 addressed to the United States and to the United Kingdom was distributed as a Security Council document S/23441 (as stated above in para. 28) — the United States and the United Kingdom, together with France, presented a draft resolution for adoption to the Security Council (U.N. doc. S/23762), the main purpose of which was to encourage Libya to provide "a full and effective response to the *request*" (emphasis added) made by the United States and the United Kingdom.

It should be noted that, in fact, the surrender of the two suspects to the United States (or to the United Kingdom) was not mentioned explicitly in this draft resolution except by a simple reference to letters reproduced in Security Council documents S/23306, S/23307, S/23308, S/23309 and S/23317 (the letters addressed to the United Nations by the United Kingdom and the United States; S/23306 was sent to the Security Council by France).

33. On the following day, 21 January 1992, the Security Council was convened and the agenda — *letters dated 20 and 23 December 1991 (S/23306, S/23307; S/23308; S/23309; S/23317)*: the letters indicated in the agenda consisted of the letters addressed to the United Nations Secretary-General by France, the United Kingdom and the United States, mentioned above — was adopted.

34. Most of the arguments presented were directed at rather general questions relating to the condemnation or elimination of international terrorism, on the tacit understanding that the destruction of Pan Am flight 103 was caused by persons (allegedly Libyan intelligence agents) now residing in Libya.

The surrender of the two suspects by Libya to either the United States or the United Kingdom was barely addressed in the Security Council debates. Support for the surrender of the two suspects was mentioned in the debates in only the statements of the United States and of the United Kingdom. The United States' representative said:

> "The resolution makes it clear that the Council is seeking to ensure that those accused be tried promptly in accordance with the tenets of international law. The resolution provides that the people accused be simply and directly turned over to the judicial authorities of the Governments which are competent under international law to try them." (UN doc. S/PV.3033, p. 79.)

The United Kingdom's representative said:

> "We very much hope that Libya will respond fully, positively and promptly, and that the accused will be made available to the legal authorities in Scotland or the United States ... The two accused of bombing Pan Am flight 103 must face, and must receive a proper trial. Since the crime occurred in Scotland and the aircraft was American, and since the investigation has been carried out in Scotland and in the United States, the trial should clearly take place in Scotland or in the United States. It has been suggested the men might be tried in Libya. But in the particular circumstances there can be no confidence in the impartiality of the Libyan courts." (*Ibid.*, p. 105.)

35. In the meeting that took place on 21 January 1992, the Security Council unanimously adopted resolution 731 (1992) which includes the following:

> "The Security Council,
>
> ……
>
> Deeply concerned over the result of investigations ... which are contained in Security Council documents that include the requests addressed to the Libyan authorities by ... the United States and the United Kingdom ... in connection with the legal procedures related to the attack[s] carried out against Pan Am flight 103 ...;
>
> Determined to eliminate international terrorism,
>
> ……
>
> 2. *Strongly deplores* the fact that the Libyan Government has not yet responded effectively to the above *requests* to cooperate fully in establishing responsibility for the terrorist act[s] referred to above against Pan Am flight 103 ...;
>
> 3. *Urges* the Libyan Government immediately to provide a full and effective response to *those requests* so as to contribute to the elimination of international terrorism;
>
> 4. *Requests* the Secretary-General to seek the cooperation of the Libyan Government to provide a full and effective response to *those requests*". (Emphasis added.)

It should be noted that, although the surrender of the two suspects was not specifically mentioned in the resolution, the "request" referred to therein meant mainly the surrender of the suspects, and that the Security Council referred to the *request* of the United States and of the United Kingdom that Libya co-operate in establishing responsibility for the terrorist act, which *request*, as I repeat, included a call for the surrender of the two suspects.

36. The Secretary-General presented a report on 11 February 1992, issued as United Nations document S/23574, pursuant to paragraph 4 of Security Council resolution 731 in which the Secretary-General gave a report on the visit of his mission to Libya and transmitted Libya's viewpoint. On 3 March 1992, the Secretary-General presented a further report on the same issue as United Nations document S/23672 which concluded that:

> "it will be seen that while resolution 731 (1992) has not yet been complied with, there has been a certain evolution in the position of the Libyan authorities since the Secretary-General's earlier report of 11 February 1992."

It was on that very date, 3 March 1992, that Libya filed the Application in the present case instituting proceedings against the United States on "questions of interpretation and application of the [1971] Montreal Convention arising from the aerial incident at Lockerbie".

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The meaning of Security Council resolution 731 (1992)

37. It appears from this chain of events dating from November 1991 to the date of the Application, namely 3 March 1992, that what concerned Libya was the fact that, on the basis of a proposal made by the United States, the United Kingdom, as well as France, the Security Council had passed resolution 731 on 21 January 1992 by which it "urge[d] the Libyan Government immediately to provide a full and effective response to *those requests* so as to contribute to the elimination of international terrorism" (emphasis added) ("those requests" being mainly the requests of the United States and the United Kingdom for surrender of the suspects).

The United States and the United Kingdom did *not* at that time appear to have considered that there was a "dispute" between themselves and Libya within the meaning of Chapter VI of the United Nations Charter, as is clear from the fact that the United States and the United Kingdom participated in the voting on that Security Council resolution 731. Libya appears to have considered that the United States and the United Kingdom would have been well aware that their demand, now called a "request", would have had to be made simply from the standpoint of a political consideration that international terrorism should be condemned and eliminated.

38. The United States and the United Kingdom were apparently of the view, on 20-21 January 1992, that Libya's refusal to surrender the two suspects named in connection with the Lockerbie incident would have consequences for the maintenance of international peace and security, and should have been dealt with by the Security Council which has primary responsibility for that object. It may be assumed that the United States and the United Kingdom would have known that the demand would not be a matter that could be dealt with from a legal point of view.

The fact that, on 21 January 1992, the Security Council dealt unanimously with the Lockerbie incident as a matter connected with international peace and security had nothing to do with the issue of whether or not the United States and the United Kingdom had legal competence to require the surrender of the two suspects and of whether or not Libya was obliged to surrender them under the provisions of the Montreal Convention. These separate issues should be examined on their own merits.

Security Council resolutions 748 (1992) and 883 (1993)

39. The United States and the United Kingdom appear, after the filing of Libya's Application in the present case, to have considered that Libya's firm resistance to the surrender of the two suspects would constitute "threats to the peace, breaches of the peace, and acts of aggression" (United Nations Charter, Chap. VII). In fact, the United States and the United Kingdom, together with France, submitted another draft resolution to the Security Council on 30 March 1992 (document S/25058). This appeal by the United States and the United Kingdom (as well as France) to the Security Council to adopt a draft resolution under Chapter VII of the United Nations Charter was not directly related to the present Application filed by Libya on 3 March 1992 and had been under negotiation in the Security Council before that date.

40. On 31 March 1992, the Security Council, "acting under Chapter VII of the Charter", adopted resolution 748 (1992). The United States and the United Kingdom, as sponsoring States, ensured that the proposal before the Security Council stated that it was "deeply concerned that the Libyan Government has still not provided a full and effective response to the *requests* in its resolution 731" (emphasis added).

> During the meeting in the Security Council, the United States' representative said:
>
> "We have called upon Libya to . . . turn over the two suspects in the bombing of Pan Am 103 for trial in either the United States or the United Kingdom . . . This resolution also makes clear the Council's decision that Libya should comply with those demands." (U.N. doc. S/PV.3063, p. 66.)

The United Kingdom representative stated:

> "We were especially grateful to the Arab Ministers who went to Tripoli last week to seek to persuade the Libyan leader to comply and hand over the accused so that they could stand trial. The three co-sponsors of the resolution have taken the greatest care to allow time for these efforts to bear fruit." (*Ibid.*, p. 69.)

In fact the demand for the surrender of the suspects was inserted implicitly into that resolution, although its main purpose was to condemn the Lockerbie incident itself totally and also, more generally, acts of terrorism in which Libya was allegedly involved. The Security Council decided to impose economic sanctions upon Libya.

41. Having obtained no positive result from Security Council resolution 748, the United States and the United Kingdom (together with France) again took the initiative in proposing a renewed resolution to the Security Council (U.N. doc. S/26701) which, on 11 November 1993, adopted Security Council resolution 883 (1993), along similar lines to resolution 748 (1992). In that meeting the United States' representative said "[w]e await the turnover of those indicted for the bombing of Pan Am 103" (U.N. doc. S/PV.3312, p. 41) and the United Kingdom's representative stated:

> "if the Secretary-General reports to the Council that the Libyan Government has ensured the appearance of those charged with the Lockerbie bombing before the appropriate United States or Scottish court . . . then the Security Council will review the sanctions with a view to suspending them immediately." (*ibid.*, p. 45.)

C. Conclusion

42. The question remains whether these Security Council resolutions, particularly resolutions 748 (1992) and 883 (1993), which were adopted after the filing of the Application in this case, have any relevance to the present case brought by Libya. In other words, the question of whether Libya's 3 March 1992 Application has become without object after the adoption of these 31 March 1992 and 11 November 1993 Security Council resolutions, is totally irrelevant to the case presented by. If there is any dispute in this respect, it could be a dispute between Libya and the Security Council or between Libya and the United Nations, or both, but *not* between Libya and the United States.

The effect of the Security Council resolutions (adopted for the aim of maintaining international peace and security) upon the member States is a matter quite irrelevant to this case and the question of whether the Application of Libya is without object in the light of those resolutions hardly arises.

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43. Even though I found that Libya's Application should be dismissed owing to the Court's lack of jurisdiction, I nonetheless wanted to express my view that these Security Council resolutions, which have a political connotation in dealing with broader aspects of threats to the peace or breaches of the peace, have nothing to do with the present case, which could have been submitted to the Court as a legal issue which existed between the United States and Libya, and between the United Kingdom and Libya, before the resolutions were adopted by the Security Council.

(Signed) Shigeru ODA

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JOINT DECLARATION OF JUDGES GUILLAUME AND FLEISCHHAUER

Article 79, paragraph 7, of the Rules of Court — Objection of mootness having an exclusively preliminary character

Actions of the United States in order to obtain the surrender of the suspects — Last substantive submission of Libya directed against these actions — Jurisdiction of the Court in this respect only to the extent that the actions in question would be contrary to the Montreal Convention

We feel prompted to make the following joint declaration with regard to the Judgment of today's date on the Preliminary Objections raised by the United States in the case concerning *Questions of Interpretation and Application of the 1971 Montreal Convention arising from the Aerial Incident at Lockerbie*.

I.

We voted against the third conclusion in the *dispositif* that "the objection raised by the United States according to which the claims of Libya became moot because Security Council resolutions 748 (1992) and 883 (1993) rendered them without object does not, in the circumstances of the case, have an exclusively preliminary character". We find that that conclusion is wrong and that it sets a potentially dangerous precedent as it undercuts the object and purpose of Article 79 of the Rules of Court.

The conclusion is wrong for the following reasons:

This case is about the Montreal Convention. What is in dispute between the Parties is the applicability of the Convention to the Lockerbie incident and the observation of the obligations flowing from its provisions in the aftermath of the incident. The case is not about the Security Council resolutions 748 (1992) and 883 (1993) which were adopted by the Council on 31 March 1992 and 11 November 1993 respectively, i.e., after Libya had submitted its Application on 3 March 1992. Libya's substantive submissions as contained in its Application and its Memorial concern the applicability of the Montreal Convention and the compliance of the Parties with particular provisions of that instrument in the handling of the Lockerbie incident. Were it otherwise, the Court would not have jurisdiction; the only base for jurisdiction in this matter is Article 14, paragraph 1, of the Montreal Convention which confers on the Court jurisdiction over "any dispute between two or more Contracting States concerning the interpretation or application" of the Convention.

The United States as Respondent claims, as a matter of preliminary objection, that "Libya's claims have become moot because Security Council resolutions 748 (1992) and 883 (1993) have rendered them without object" (Judgment, para. 45). The aim of the objection is to obtain a decision from the Court that there is no ground for proceeding to judgment on the merits. This is an exclusively preliminary objection. The Court could — and should — have decided on it without thereby passing judgment — if only in part — on the merits of Libya's claims.

Had the Court rejected — in whole or in part — the Preliminary Objection in question, then it would now turn — in so far as the Preliminary Objection was rejected — to the merits of the Libyan submissions and examine them one by one within the limits of its jurisdiction. The outcome of that examination would in no way be predetermined by the previous examination of and decision on the objection of the United States.

Had the Court, on the other hand, accepted the objection raised by the United States, then the Court would have effectively ended the case. It would, however, have done so without deciding on the merits of any of the submissions presented by Libya or predetermining them. The Court would have left the Montreal Convention completely aside. It would have based its decision exclusively on a new element, extraneous to the Montreal Convention and not related to it — the Security Council resolutions. In adopting resolutions 748 and 883, which contain decisions made under Chapter VII of the Charter and binding under Article 25, the Security Council has not taken position with regard to the Montreal Convention; in no way has it decided whether the provisions of the Convention are applicable to the Lockerbie incident, nor has it decided or taken position on the question whether the provisions of the Convention have been complied with by the Parties. Rather, in the exercise of its primary responsibility for the maintenance of international peace and security, the Council found it necessary to impose certain obligations on Libya. In accordance with Article 103 of the Charter, those obligations override all other obligations of the Parties, irrespective of whether the latter obligations were contested between the Parties or whether they had been complied with or not. The lack of connection between the Security Council resolutions and the position of the Parties under the Montreal Convention precludes the evaluation of the objection of the United States as a defence on the merits; it also prohibits to state, as the Court does, that the objection "does much more than 'touch[ing] upon subjects belonging to the merits of the case'" (Judgment, para. 49) or that it is "'inextricably interwoven' with the merits" (*ibid.*).

Because this is so, the third conclusion of the *dispositif* of the Judgment seems to run counter to the jurisprudence

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of the Court concerning the application of Article 79 of the Rules of Court since their 1972 revision. The Court, with one exception (*Military and Paramilitary Activities in and against Nicaragua (Nicaragua* v. *United States of America), Preliminary Objections*, 26 November 1984, *I.C.J. Reports 1984*, p. 392), has always dealt with preliminary objections in the first phase of the proceedings and has indeed favoured a restrictive interpretation of the notion "not exclusively preliminary" in the interest of speedy and economical disposal of the objections (*ibid., Merits*, 27 June 1986, *I.C.J. Reports 1986*, pp. 29 ff).

The Judgment seeks to justify its third conclusion by declaring that accepting the Preliminary Objection of the United States would have meant taking "a decision establishing that the rights claimed by Libya under the Montreal Convention are incompatible with its obligations under the Security Council resolutions" (Judgment, para. 49). It adds that acceptance of the objection raised by the Respondent would have constituted "a decision that those obligations prevail over those rights by virtue of Articles 25 and 103 of the Charter" *(ibid.)*. This might be true, but it is beside the point for the decision to be taken now on the Preliminary Objection of the United States. Defining the meaning and the effect of the resolutions of the Council and comparing those resolutions with the submissions of Libya regarding the Montreal Convention in no way means taking position on the rights and obligations of Libya under the Convention.

That acceptance of the Preliminary Objection of the United States would have brought the case to an end is also not in itself an argument against its exclusively preliminary character: the ending of a case is the intention of every preliminary objection. This is so in the case of objections of the kind of those dealt with in the third conclusion of the *dispositif*. The Court has in the past had occasion to deal with such objections and has considered them separate from the merits; it dealt with them even before turning to jurisdiction and admissibility (*Nuclear Tests* cases *(Australia* v. *France)*, 20 December 1974, *I.C.J. Reports 1974*, pp. 259 and 272 and *(New Zealand* v. *France)*, 20 December 1974, *I.C.J. Reports 1974*, pp. 457 and 578). In this connection it has also to be pointed ou that if the Council terminated, with effect *ex nunc*, the measures prescribed by resolutions 748 and 883, the position of the Parties under the Convention would still exist, unchanged.

The third conclusion of the *dispositif* runs counter to the object and purpose of Article 79 of the Rules of Court and sets a dangerous precedent for the future handling of that provision for the following reasons:

When the Court, in 1972, adopted the text which later became Article 79, it did so for reasons of procedural economy and of sound administration of justice. Court and parties were called upon to clear away preliminary questions of jurisdiction and admissibility as well as other preliminary objections before entering into lengthy and costly proceedings on the merits of a case. Of course, provision had to be made for objections that did not possess "in the circumstances of the case, an exclusively preliminary character" (Art. 79, para. 7). In order to make the necessary determinations the Court, "whenever necessary, may request the parties to argue all questions of law and fact, and to adduce all evidence, which bear on the issue" (Art. 79, para. 6). The interpretation given by the Court in the present case to the notion "not exclusively preliminary character" is, however, so wide and so vague that the possibility of accepting a preliminary objection becomes seriously restricted. Thereby the Judgment acts counter to the procedural economy and the sound administration of justice which it is the intent of Article 79 to achieve.

II.

We would also like to state that we have voted in favour of the first conclusion of the *dispositif* on jurisdiction of the Court over the case on the following understanding relating to the last of the substantive submissions presented by Libya in its Application and its Memorial:

In the version submitted to the Court in the Libyan Memorial this submission concerns an alleged legal obligation of the United States

> "to respect Libya's right not to have the [Montreal] Convention set aside by means which would in any case be at variance with the principles of the United Nations Charter and with the mandatory rules of general international law prohibiting the use of force and the violation of the sovereignty, territorial integrity, sovereign equality and political independence of States" (Judgment, para. 33).

We recognize that there is a legal dispute between the Parties concerning this point. That dispute, however, falls under Article 14, paragraph 1, of the Montreal Convention and therefore within the jurisdiction of the Court only if, and in so far as, it concerns the interpretation and application of one or more of the provisions of the Convention. The dispute does not fall under Article 14, paragraph 1, and the jurisdiction of the Court if it concerns the interpretation and application of Article 2, paragraph 4, of the Charter of the United Nations. That is spelled out in paragraph 35 of the Judgment, but not so explicitly in the *dispositif*; that is why we wish to make our position on the matter quite clear.

(Signed) Gilbert GUILLAUME.

(Signed) Carl-August FLEISCHHAUER.
